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American Bar Association JOURNAL

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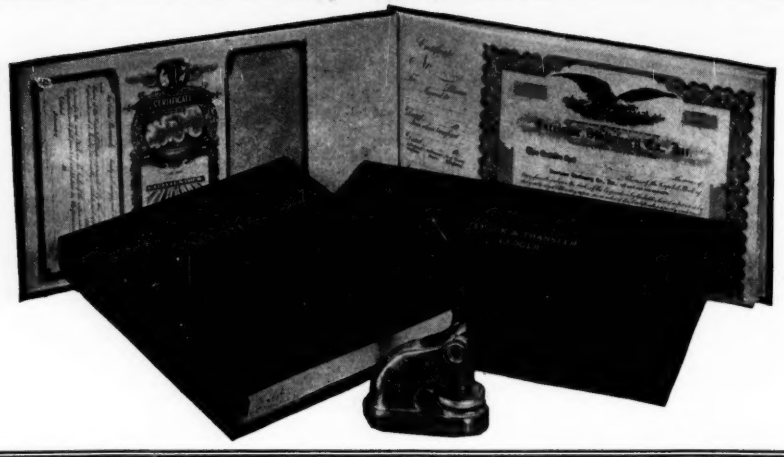

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Table of Contents

January, 1959

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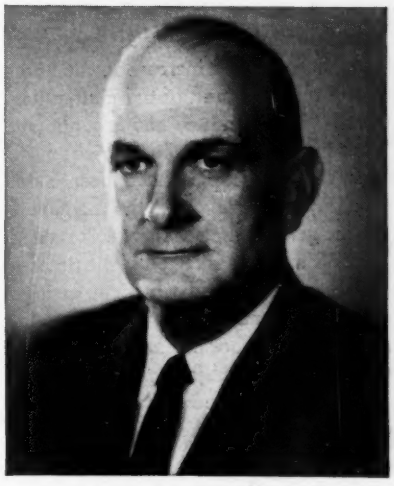
The President's Page

Ross L. Malone



The National Conference on Continuing Education of the Bar

The January President's Page is being prepared just prior to the convening of the National Conference on the Continuing Education of the Bar at Arden House. Because this promises to be one of the most significant conferences of lawyers in this generation, I am devoting the President's Page in its entirety to publication of the introductory letter stating the background and objectives of the Conference, which was addressed to the conferees by the Presidents of the American Law Institute and the American Bar Association.

It is a source of regret to all of us that the limited facilities available make it impossible to include in the Conference all of the lawyers whose interest in continuing legal education qualifies them to attend.

It is anticipated that the conclusions reached by the Conference will be published and made available to the entire profession as soon after adjournment as possible. In preparation for the distribution of these conclusions, it is believed that wide dissemination of this statement of its objectives will contribute to the ultimate benefit which the profession will receive from the Conference.

The introductory letter is as follows:

To the Conferees:

As Presidents of the American Bar Association and The American Law Institute, we would like to welcome you as a Conferee of the National Conference on Continuing Education of the Bar and express our appreciation of your willingness to devote your time to accomplishment of the important objectives of the Conference. You will be a member of a carefully selected group of 110 leaders of the Bar of the United States who will participate in this significant Conference.

A brief statement of the background, composition and objectives of the Conference may be helpful in advance of your arrival at Arden House.

Invitations to the Conference have been issued to:

The President, or President-Elect if designated by the President, of each state and territorial bar organization represented in the House of Delegates of the American Bar Association; the presidents of certain major city bar associations; representatives of selected law schools of the United States; a representative of the Junior Bar Conference and of The Canadian Bar Association; members of the Joint ALI-ABA Committee on Continuing Legal Education; and a limited number of lawyers and judges selected for the contribution which each is in a position to make to the success of the Conference. The Conference unquestionably will be one of the most distinguished gatherings of members of the legal profession which has occurred in the United States in many years.

The Conference is modeled in some respects after the National Conference on Legal Education sponsored by the American Bar Association in 1922, which is now considered to have been the birthplace of the modern standards of legal education and admission to the Bar. It is hoped that the National Conference on Continuing Education of the Bar may be of comparable significance.

The Conference is made possible by a grant from the Fund for Adult Education, established by the Ford Foundation.

Organized continuing legal education had its inception in the United States twenty-five years ago with the founding of the Practicing Law Institute of New York. The demand for refresher courses by returning veterans immediately following World War II gave great impetus to the program and was a major factor in the formation of the joint-American Law Institute–American Bar Association "Committee of 22" generally referred to as the ALI-ABA Committee.

Under the auspices of this Committee, financed by a grant from the Carnegie Corporation, a national program of continuing legal education in the United States has been conducted during the past ten years.

Starting almost from scratch, except for what had been done in the field of federal taxation, the Committee, as a co-operating agency in arranging institutes, has participated in approximately 700 institutes in forty-four states with an aggregate attendance exceeding 80,000. There has also been a great deal of continuing legal edu-

cation conducted independently of the Joint Committee. The past year has brought a marked increase in the number of institutes and of those attending them. The Committee has brought out forty-five handbooks, of which more than 225,000 copies have been sold. *The Practical Lawyer*, the magazine for the general practitioner, was started in 1953 and is published eight times a year. Its short and practical articles supplement and complement the Committee's handbooks. Articles cover a wide variety of subjects for the general practitioner. It now has something over 16,000 subscribers.

Some states, such as California, have established programs whereby the Bar and the law schools, using the extension facilities of the state university, jointly conduct an extensive continuing education program.

The cumulative total of the post-admission instruction available to the legal profession of the United States from the sources mentioned above constitutes the present status of continuing legal education in the United States today. In many respects it has grown with a minimum of organization or uniformity. Without question, the program now being carried out has made a significant contribution to the improvement of the qualifications of the legal profession to render legal services to the public today. Nonetheless, it is apparent, even on a cursory examination from the national level, that little or no uniformity exists in either the quantity or quality of continuing legal education in the various states of the United States. The California program is one of the most highly developed state-wide programs in the United States. At the other extreme there are some states in which continuing legal education is practically nonexistent today. Many so-called legal institutes are more entertaining than educational. Often there is no continuity in the planning of courses resulting in duplications, as well as omissions.

While great strides have been made since the inception of post-admission education in the United States, and particularly since formation of the ALI-ABA Committee in 1946, it must be conceded that much remains to be done in order to establish a comprehensive, planned program of education for practicing lawyers throughout the United States.

The importance of this, to both improve the professional competence of lawyers and to develop their sense of professional responsibility to the public, cannot be exaggerated. The criticisms of the qualifications and characteristics of American lawyers on admission to the Bar today are, first, that they lack practical training sufficient to qualify them to competently advise, counsel and represent clients and, second, that they do not have a full appreciation of what it means to be a lawyer either from the point of view of the obligations which that entails or of the opportunities which it offers to serve the community and the country. These criticisms do not come only from the layman but from the best informed and most dedicated members of the Bench and Bar. And most lawyers admit the soundness and fairness of these criticisms. On the other hand, it seems to be pretty well recognized by the organized Bar and by the law schools that it is impracticable to furnish the remedy either before or during the ordinary law school period. The result is inescapable that the remedy must be found after admission to the Bar through what has come to be known as continuing legal education and that the responsibility that this be done, and done promptly, rests with the Bar itself.

It is the purpose of the National Conference on Continuing Education of the Bar to:

1. Make available to all states the experience in this field of the states and institutions which are most advanced in their programs.

2. Analyze the present status of continuing legal education in the United States today, determining both what is good and what is bad about the present program.

3. Agree upon the type of continuing education program for the Bar which will meet the need of the profession and hold out the greatest hope of benefiting the major portion of the Bar, in the light of the necessity for adapting the program to the needs and conditions of individual states.

4. To determine how continuing legal education can be more clearly related to education in the law schools.

5. Determine how continuing legal education can be used more effectively to educate the members of the Bar as to its public responsibilities, both collectively and individually.

6. Determine the place of bar associations and the place of the law school in the continuing legal education program of the future, and make recommendations as to the relationship between these two agencies which will insure the most effective use of the resources which each has to offer.

7. Devise plans whereby the program which may be agreed upon at the Conference can be put into operation in all of the states in a minimum of time and with a maximum of effectiveness.

Questions implicit in the foregoing objectives which will be the subject of discussion at the Conference include:

How can the quality of legal institutes be improved and the benefit to participants be increased?

What inducements can be provided which will substantially increase the attendance of members of the Bar?

Is it feasible to provide diplomas, certificates or other forms of recognition as a means of stimulating attendance?

Could the joint ALI-ABA Committee act as a central accrediting agency which would approve the adequacy of the program of instruction to the end that both quality and uniformity will be increased?

What is the place of one and two week summer courses by law schools in the post-admission field?

Is a paid staff essential to an effective program, and if so, how can one be obtained?

Can a continuing legal education program be self-sustaining?

What is necessary to make it self-sustaining?

To what extent should the program include the publication and sale of books, pamphlets and treatises of various kinds?

We hope and believe that the cumulative experience of the conferees at Arden House will provide sound

(Continued on page 84)

published monthly

American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar to each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except that for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference or the Section of Legal Education and Admissions to the Bar. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $5.00; Criminal Law, $2.00; Family Law, $5.00; Insurance, Negligence and Compensation Law, $5.00; International and Comparative Law, $5.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral and Natural Resources Law, $7.00; Municipal Law, $3.00; Patent, Trademark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $5.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East 60th Street, Chicago 37, Illinois. An application for membership should be accompained by a check for dues in the appropriate amount as follows: $16.00 for lawyers first admitted to the Bar in 1953 or before; $8.00 for lawyers admitted between 1954 and 1956; and $4.00 for lawyers admitted in 1957 or later.

Manuscripts for the Journal

■ The JOURNAL is glad to receive from its readers any manuscript, material or suggestions of items for publication. With our limited space, we can publish only a few of those submitted, but every article we receive is considered carefully by members of the Board of Editors. Articles in excess of 3000 words, including footnotes, cannot ordinarily be published.

Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

Manuscripts are submitted at the sender's risk and the Board assumes no responsibility for the return of material. Material accepted for publication becomes the property of the American Bar Association. No compensation is made for articles published and no article will be considered which has been accepted or published by any other publication.

American Bar Association

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Improving the Jury System

Clarence K. Streit's article on jury service and your editorial comment on it in your October issue deserve careful consideration especially by the legal profession and the courts. No one knows better than they that it is the widespread abuse of the jury system and not the jury system itself which is at fault. They also know that once the jury system is freed of political influence attendant difficulties are soon resolved.

Many fine articles have been written on this subject, but they do not register a sufficiently compelling impression because they treat a juror's reaction to jury service after, rather than before, his service. The testimony of a convert to any cause is interesting reading, but it seldom wins other converts. This is true because an individual must first convince himself of the rightness of a cause before he can accept it.

The average American citizen readily accepts the *principle* of jury service *until* he is picked for the job. His reaction then depends on his confidence, or lack of it, in the manner in which jurors are selected in his county. No matter how patriotic he may be or how willing to carry his civic responsibilities, he rebels at having to carry those of his neighbor as well.

But when he knows that no one is given preferred consideration, jury service becomes an honored privilege rather than an imposition to be passed on to someone else. Citizens of Lake County, Illinois, found this to be true during the six years it has operated under the Jury Commission Law. They know that no influence is strong enough to have a person excused from jury service. The support given the Commission by the judges has discouraged any interference.

The procedure followed by our Jury Commission is to mail a questionnaire to coded names on the list of registered voters. An editorial, "Informed Citizens Don't Balk at Jury Service", which appeared in the August 25, 1956, issue of the *Saturday Evening Post*, is also mailed with the questionnaire.

For their guidance in interviews, the Commissioners adopted the following principles:

No one, whatever his occupation, except those exempted by law, mothers of young children, and cases of extreme hardship, will be excused from jury service.

Jury duty is more important than one's occupation.

A citizen who loses wages during jury duty makes just as valuable a contribution as the executive whose concern loses his services.

It is an honor and privilege to serve as a juror and not a burden to be passed on to another.

Intelligence and integrity are more important in a juror than formal education and success in his work.

Everyone will be treated alike.

No one can substitute his thought and integrity for that of another—an excused juror has no counterpart.

We, as Commissioners, believe in the jury system.

At the conclusion of the interview, the prospective juror is given an article entitled, "There Is a Reason for Jury Service", written by Sydney J. Harris, a staff writer for the *Chicago Daily News*.

Cards with the names of those qualified for petit or grand jury are placed in a revolving drum from which they are drawn by a blindfolded clerk, in the presence of one judge, one commissioner and the clerk of the Jury Commission, when a jury is called for.

In fairness to those in politics it should be recalled that their influence is usually requested as often as it is offered. Lake County's Jury Commission has no such problem today. The problem it does have is to pacify the indignant person who has made a definite sacrifice to be away from his or her business only to be refused jury service because of a supposedly prejudicial viewpoint. Some fair-minded persons with a strong sense of responsibility have been lost to jury service because of the use of this prerogative. This of course is a universal problem as an attorney cannot accept a juror he believes may endanger his case.

During six years of Jury Commission administration almost 1000 persons annually from over the county have served as jurors as against a small rotating group who had previously served.

Consequently in addition to the higher calibre of jurors now serving about 1000 persons annually are gaining first-hand knowledge of law enforcement and other problems of their community.

The American jury system, when free to function as it was intended, is one of democracy's greatest assets. To change it in any way, on the pretext of expediency, is to retreat further from the principles of self-discipline and responsibility laid down for us in our Constitution. Leadership in preserving this indispensible arm of our courts rests with the legal profession, the courts and law journals such as the AMERICAN BAR ASSOCIATION JOURNAL.

CASPER APELAND

Waukegan, Illinois

Solon's Writings and Lawyers' Culture

In the October issue of the JOURNAL there appeared an article by Mr. Charles S. Rhyne, President of the Association. In that article Mr. Rhyne stated "a survey of the writings of Solon (600 B. C.) . . . and other celebrated legal scholars down through the centuries, reveals that in all the great legal systems . . . there is no fundamental difference in concept in the underlying legal principles". 44 A.B.A.J. 940, October, 1958.

I think it might be worth pointing out that the only writings of Solon which are extant are some 300 lines of poetry setting forth his purposes and achievements. See *The Ancient World*, Volume 1, Joseph Ward Swain, Harper & Brothers, New York, 1950, page 309.

The technique of Mr. Rhyne's article is the "appeal to authority". We lawyers are often accused of being somewhat narrow in our cultural scope. The article says, in essence, as refutation of this charge, "See how much historical culture with which we lawyers are acquainted. We have read, studied and analyzed all of these legal writings."

It would perhaps be best to be caught being culturally limited rather than be caught making statements colored with references not backed by fact.

What lawyer would cite a case as sustaining his position without verifying the position of the case?

Let us not, as lawyers, be "caught with our culture down".

CHARLES A. BARTH

Washington, D. C.

Mr. Rhyne Replies to Mr. Barth

In reply to the criticism of my scholarship by Mr. Charles A. Barth, I confess that in referring to the "writings of Solon", I was really thinking in general of the great legal and constitutional reforms which are largely credited to him, the depth and wisdom of which have sufficed to merit for Solon the designation of "One of the Seven Wise Men". There is no doubt that he did not personally and by hand write out this entire Code, but it was under his direction and during his archonship that it came to be law. Kathleen Freeman, in the *Life and Work of Solon*, at page 13, states:

> Before Solon's reforms the Athenian constitution was a strict oligarchy; after them it develops rapidly in the direction of democracy, until less than two centuries later the position of extreme democracy is reached.

These reforms, I submit, suggest strongly the intense respect which this statesman had for the rule of law and its inherent principles of equality and justice.

However, I do not concede that my actual statement was inaccurate, for I have long considered a passage from his *Salamis* one of the most beautiful endorsements of the rule of law which I have yet to encounter:

(Continued on page 13)

What Will Tomorrow's Telephones Be Like?

PICTURE OF TOMORROW. Will tomorrow's telephones be smaller and lighter and specially designed for each room? Will the dial, mouthpiece and receiver all be in the unit you hold in your hand? Will you be able to get your party just by pushing buttons, instead of dialing? We're working on many types and testing them at Bell Laboratories and in homes and offices.

This country is going to be needing a lot more communication service in the years ahead. Matter of fact, the need is with us right now.

Just the great increase in population (there will be 40,000,000 more people in the U. S. by 1970) means that we'll be stepping right along to keep ahead of our customers' needs.

The greatest progress will come, as it always has, from the Bell System's unique concept of unified research, manufacturing and operation that has given this country the best telephone service in the world.

A vital part of this concept is always to look ahead and not back. Many new things are already at hand or in sight.

New instruments will provide an ever-widening choice for our customers. Improvements in transmission and the development of electronic switching will make our services faster and more versatile.

There are some tremendous possibilities in the use of telephone facilities for enabling business machines to communicate with each other—no matter how many miles apart. Great volumes of data of all kinds can be transmitted automatically over telephone lines at high speed.

We also have the prospect of providing picture channels for many purposes, in addition to the present networks for television broadcasting.

How far we go, and what we are able to do, depends on money. To make the best progress and apply it to the greatest advantage of everybody, the Bell Telephone Companies must be in good shape financially.

In all lines of business it is the companies whose earnings are good that are able to make the best products, provide the best service and give the best values.

BELL TELEPHONE SYSTEM

Now—electronic dictation comes of age through McGraw-Edison's inventive heritage!

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(Continued from page 10)

These are the lessons which my heart bids me teach the Athenians, how that lawlessness brings innumerable ills to the state, but obedience to the law shows forth all things in order and harmony and at the same time sets shackles on the unjust. It smoothes what is rough, checks greed, dims arrogance, withers the opening blooms of ruinous folly, makes straight the crooked judgment, tames the deeds of insolence, puts a stop to the works of civil dissension and ends the wrath of bitter strife. Under its rule all things among mankind are sane and wise.

On the basis of this passage and my readings of *Solon the Athenian*, University of California Press (1919) by Ivan M. Linforth, and *Solon and His Political Theory*, William Fredrick Press (1958) by John E. Rexine, as well as the Freeman work mentioned above, I cannot help but feel that my reference to Solon was not unjustified.

CHARLES S. RHYNE

Washington, D. C.

He'd Like "Arthur Train" Stories

I have been a member of the American Bar Association for some years and I am pleased with the recent increased tempo of its activities. At one time only three of the local Bar belonged but now I am glad to report we have a substantial membership. In former years I have often wondered if the Association knew that most lawyers were dealing with the very modest problems of the average citizen.

While I feel sure the Association today does know this to be the case, I feel the JOURNAL is not written in such a way as to greatly interest the average lawyer. I find that most of my fellow attorneys in this area read few of the articles that appear.

My friends in the medical profession show me some of their publications which, at least so it seems to me, have articles that are of interest to the general practitioner. One of these magazines, *Medical Economics*, while not a Medical Association publication, seems to be of universal interest to

(Continued on page 14)

(Continued from page 13)
most of my doctor friends.

Could we not have an "Arthur Train" type story occasionally and a few modest items interspersed with such eminent articles as have filled the JOURNAL in recent months?

T. A. BUHL

Batavia, New York

A Tricky Question Under the Jones Act

I read of the American Bar Association Medal award to the late William Clarke Mason, of Philadelphia. In 1918 I was attorney for a man named Berg. Mr. Mason represented his client, Philadelphia and Reading Railroad, reported 274 Fed. 534, and 266 Fed. 591. In that case, having recently lost the *Chelentis* case, 247 U. S. 372, Mr. Mason gave me a fright that he would succeed in getting the Supreme Court to hold that the saving of a remedy at common law to seamen in the creation of the Judiciary Act did not save any right to trial by jury. It had something to do with the phrase often discussed in the Jones Act of June 5, 1920, U. S. Code, 688, "any seaman may elect and have a right to trial by jury"...

I knew Mr. Mason's ability and standing at the Bar was such that I think I had good reason to be worried.

They had a peculiar rule in Federal Court in that District then. It was reversible error to mention to the jury in summation the amount sued for by the plaintiff. Perhaps the rule still exists.

SILAS BLAKE AXTELL

New York, New York

If We Land There Soon, Who Owns the Moon?

A number of statements are in circulation as to the possible upper boundary of our sovereignty in space. The recent splendid shot towards the moon, attaining 75,000 miles or about one third of the distance, justifies a proposal relating to the moon in relation to sovereignty.

Moving outward from the earth, the first and nearest solid object is the moon. Much is known about the moon. Its orbit and its swings in orbit are predictable. Its dimensions are well known. Its average distance is in the range of 238,000 miles. Radar signals have been bounced back from the moon. The moon is the first solid object in nature permanently located along any track on the way out from the earth.

While no man is reported to have struck the moon with a missile and no man is reported to have caused a missile to circle the moon, very serious projects to perform these two feats are well under way and may succeed at any time.

Furthermore, very serious men contemplate that human beings may in the relatively near future be enabled to land on the moon and even to return.

Any survey of the national airspace

(Continued on page 16)

(Continued from page 14)

upper boundary may therefore properly consider the moon in this connection.

For convenience, space between the earth and the moon may be termed cis-lunar. Space beyond the moon is trans-lunar.

Radio devices in the satellites are sending back reports on various aspects of what exists in cis-lunar space. 1,500 miles is somewhat less than one per cent of the entire journey from the earth towards the moon. 80,000 miles is one third of the journey.

What forces and what things exist in the remaining two thirds of cis-lunar space is at present conjectural. Do we see cis-lunar space? Or only see through it? We have no physical samples of what is there. We have only selected radio and radar reports.

What exists in trans-lunar space is even more conjectural.

But the moon itself is not a total conjecture. The facts about the moon are only to some degree conjectural. We know much about its composition. It is not unreasonable to expect and foresee that some man will presently make some use of the moon which will have some influence on political and economic life on earth.

The moon in its orbit, like the man-made satellites at lower levels, is continually passing through areas of outer space which are space-areas projected upwards from some, but not all of the ninety-odd political sovereigns of the earth's surface. The moon, like the sun, swings between northern and southern tropics. Therefore it regularly and at least once annually crosses every sovereign area in the tropics. But it never crosses a sovereignty whose land surface is north of the northernmost moon tropic or south of the southernmost moon tropic. Now, the moon's tropics are Lat. 28 degrees 36 minutes north and south of the Equator. A glance at an atlas shows that the moon is *never* overhead in any part of Europe or of the USSR, or Tunisia, Morocco, Israel and Jordan, Afghanistan, Japan, Philippines, Canada or Uruguay. Therefore, as a matter of vertical sovereignty only the states between Lat. 28° 36′ north and south have an "overhead" interest in the moon.

The conclusion seems to be that the moon, in relation to its use by a man, is a matter of *vertical* sovereign interest only to the U.S.A. and our sister republics (excluding Uruguay), to sixteen Asian states, to twenty-eight African states, and Australia and Madagascar, about sixty-six of the present-day sovereign states whose land and water surfaces lie between the moon's northern and southern tropics, and whose upward projections are regularly crossed by the moon.

The fact that the moon does not pause permanently in the area of any one sovereign is not material. Like an aircraft in flight, it passes from the space area of one sovereignty to the space area of another. While it is in the space area of a certain sovereign, however temporarily it is subject to that sovereign at least in the legal sense that whatever happens on Mount Everest is within the sovereignty of Nepal, or an event on Aconcagua happens in the State of Mendoza of Argentina.

The concept of sovereignty has never been simple or single. It was a matter of debate when sovereigns were human emperors. It is more debatable nowadays when all states are "democratic" or "republics" or "constitutional monarchies".

Sovereignty in this twentieth century is not a single simple concept. There is "full" sovereignty of land, and of waters enclosed by land, and earth below and air above. There is a certain lateral sovereignty of the waters of the coastal belt, another variety of the surface of the territorial sea, of the submerged Continental Shelf, of the sea-bed, of fishery zones. There is a sort of diagonal sovereignty of aircraft-identification zones, of "Texas towers" far from the land. Some of these concepts of sovereignty are of a legal character which can be spoken of as absolute. Some of them are less than absolute. Some are shared with other sovereigns. Some are horizontal layers, like the Continental Shelf, and the sea-bed, and like the fishing waters which are above the sea-bed and below the sea surface. Some are vertical shafts or cones. As the elements of matter have their isotopes, sovereignty is a bundle of concepts, ranging above and below the median concept.

The time is near, if not already upon us, when men must formulate a version of sovereignty applicable to that familiar object, the moon. Now that actual shooting at the moon has been seriously attempted and came close to success, the rules of the shooting gallery should be posted for all to read. And a first question is whether the rules may be made primarily by the states which have the moon directly overhead, or whether the diagonal states are entitled to their word.

The rule of "overhead sovereignty" is old and settled. If we are to have a rule of "diagonal upward sovereignty", that is something quite new, and its possible relation to lateral extensions of sovereignty, towards Continental shelves, fisheries, and navigational controls, requires careful examination.

ARNOLD W. KNAUTH
New York, New York

Overcrowded Dockets Are the Supreme Court's Fault

There is now a great deal being said by the Chief Justice, among others, about the overcrowded dockets. This complaint seems to be justified in many areas, (but I do not believe our Baltimore docket is subject to complaint). But he and they fail to put their fingers on one of the most basic of troubles, the one about which the late Justice Roberts gave due warning, namely, the failure of the Court to respect the rule of *stare decisis* to the extent that it should. That is the reason for the bringing of many cases, and is, in the opinion of the initiated, one of the important keys to the problem.

It has been said, with truth, by high authority, that it is almost as important that the law be *settled*, as that it be settled right. If the law is settled, then, at least, one can know with a reasonable degree of certainty what to expect from his actions, and that is the essence of a stable and an orderly society.

My views are not to be taken as in any sense an attack upon the Court as an institution, and I resent any such inference, but as an effort, however feeble it may be, to do my part in trying to persuade the Court to confine itself to *interpretation* of the Con-

(Continued on page 20)

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(Continued from page 16)

stitution and law, and therefore to withdraw from the field of legislation and from that of politics, both national and international, certainly a legitimate function of the Bar.

Now, anyone who has kept a weather-eye out, in recent years, on the course of decisions of the Supreme Court, has inevitably anticipated the development of overcrowded dockets, and the consequent criticism.

Justice Roberts, with Justice Frankfurter, dissenting, in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 112, warned the Court of this prospect, saying:

> The evil resulting from overruling earlier considered decisions must be evident. In the present case, the Court below naturally felt bound to follow and apply the law as clearly announced by this Court. If litigants and lower Federal Courts are not to do so the law becomes not a chart to govern conduct but a game of chance; instead of *settling rights* and liabilities *it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the improbable chance that the asserted rule will be thrown overboard.* Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequences will inevitably be that the administration of justice will fall into disrepute.[1]

He then made the obvious remark:

> Respect for tribunals must fall when the *bar* and the *public* come to understand that nothing that has been said in prior adjudications has force in a current controversy . . . the tendency to disregard precedent in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in the consistency of decisions, and leave the courts below in an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow, unless indeed a modern instance grows into a custom of members of this court to make public announcement of a change of views on the same question when another case comes before the court. This might, to some extent, obviate the *predicament* in which the *lower courts*, the *bar*, and the *public find* themselves.

This warning was subsequently renewed by Justice Roberts in another case in the same volume, *Smith* v. *Arkwright*, pages 649, 668, where he bitingly remarked: "The reason for my concern is that the instant decision overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only", and he continued in the general vein of his remarks in the *Southern S. S.* case, but that such warnings have been ignored subsequent cases will show.

A modern echo of these lamentations is found in the concluding statement of the present Justice Harlan in *U. S.* v. *Ohio Power Co.*, 353 U. S. 98, 111: "For the reasons given I must dissent. I can think of *nothing more unsettling to lawyers and litigants, and more disturbing to their confidence* in the even-handedness of the Court's processes, *than to be left in the kind of uncertainty which today's action engenders*, as to when their cases may be considered finally closed in this Court", and as to the Court's "free wheeling" see his and Justice Frankfurter's dissent in *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U. S. 326.

That this is true is now further attested by such eminent jurists as Judge Learned Hand, considered by many as the *primus inter pares* among sub-Supreme Court judges, when he declared that: "I cannot frame any definition that will explain when the court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the States within their accredited authority."

Charles Warren in his classical *The Supreme Court in U. S. History* reminds us and the Court, that: "However the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decisions of the Court."[2]

Justice Brewer, in *South Carolina* v. *United States*, 199 U. S. 437, repeats the fundamental truth that "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now . . . Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day."

GEORGE WASHINGTON WILLIAMS
Baltimore, Maryland

Ignorance and Freedom Are Incompatible

Referencing the "Revitalizing Citizenship" article by Mr. Nilsson (44 A.B.A.J. 517), I should like to point to the words of Thomas Jefferson which say:

> If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be.

This statement by Jefferson, in my opinion, should be given "Commandment" status in the minds and hearts of the American people, because it shows us a *how* to keep our freedom, better than the "Eternal vigilance is the price of freedom" statement, at least to my way of thinking.

There are many kinds of ignorance or many causes of ignorance:

1. Lack of intelligence
2. Lack of information
3. Lack of truthfulness
4. Lack of education
5. Failure to recall or *ignoring.*

Thus, Jefferson's "be ignorant and lose your freedom" is a warning to us, and the alert must extend to every species of ignorance. (I am ashamed to say that I do not recall reading this statement before, which probably means that I now confess that I have never read all of Jefferson's writings, as I should have.)

I recall several years ago that the "ignore" kind of ignorance came up emphatically in some situation (I have now forgotten), and so I wanted to "write a letter to the Editor" requesting that the accent in the word *ignorance* should be put on the second syllable, and on investigating the word in an old, unabridged dictionary, I found that Boyle had made this statement:

(*Continued on page 64*)

1. All italics supplied unless otherwise indicated.
2. Volume 2, page 748, and see *Who's Who.*

The Problem of School Segregation:

A Serious Challenge to American Citizens

by William P. Rogers • *Attorney General of the United States*

The issues raised by the Supreme Court's reversal of *Plessy* v. *Ferguson* present a great constitutional question. In addressing the second session of the Assembly at the Association's Los Angeles Annual Meeting last August 27, Attorney General Rogers explained the position of the Justice Department in the struggle that is now going on over the question of racial segregation in the public schools.

The subject of my talk here today concerns a matter which is of great moment to our nation. I refer to the decision of the United States Supreme Court in the *School Segregation Cases*[1] and to some of the problems which have arisen in connection with the implementation of that decision.

They are numerous, and they go deep; often they engender strong feelings. The subject is one which calls for our most serious and thoughtful consideration. I choose this occasion to discuss it because this is a gathering of lawyers, lawyers from every corner of our land. Every lawyer, as the late Arthur T. Vanderbilt, Chief Justice of New Jersey, reminded us, has "the responsibility of acting as an intelligent and unselfish leader of his community.[2] No class in our society", he has said, "is better able to render real service in the molding of public opinion."[3]

Let me make it clear at the outset that my discussion of these problems today does not relate to the implementation or timing of any specific court order or to any proceedings now in court. My purpose is to discuss some of the broad problems in this field.

In the Department of Justice we have given much thought to the various aspects of these problems. Without attempting or purporting to deal with all these various aspects let me say that as I see it, the ultimate issue which emerges does not turn upon the evaluation of particular rules of law. The ultimate issue becomes the role of law itself in our society; whether the law of the land is supreme or whether it may be evaded and defied.

On May 17, 1954, the Court announced its unanimous decision—and I quote from the opinion—"that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

The decision was foreshadowed by earlier holdings. Thus, as early as 1938, the Court, speaking through Chief Justice Hughes, had concluded that a Negro living in Missouri was entitled to study law at the University of Missouri, a state school, there being no other law school maintained by the state which he might attend. The constitutional requirement of "equal protection of the laws" was not deemed satisfied by the state's offer to pay tuition at a school of comparable standing in a nearby state.[4] Then, in 1950, the Court, in a unanimous opinion written by Chief Justice Vinson, examined intangible as well as tangible factors in determining that a separate law school maintained by Texas for Negro residents of that state did not provide the same opportunities as were offered by a legal education at the University of Texas.[5]

Notwithstanding this litigation involving public education at the university level, the decision in *Brown* v. *Board of Education*, as you well know, had serious impact on certain sections of our country and was met with apprehension, resentment and even threats of defiance.

Since the date of that case, holdings of the Supreme Court and of the lower federal courts emphasize that a state may not engage in other forms of segregation, for example, in providing recreational facilities and in public transportation. The courts have concluded that for a state to enforce separation on the basis of racial criteria, even though the separate

1. *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 294.
2. 40 A.B.A.J. 31, 32.
3. *Ibid.*
4. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337.
5. *Sweatt* v. *Painter*, 339 U.S. 621.

facilities provided may be physically similar, is to deny equal protection of the laws.

"Separate but Equal" a Thing of the Past

So the doctrine "separate but equal" must be considered a thing of the past. In other words, a state law which requires a Negro to act or not to act or to do a certain thing merely and solely because he is a Negro violates constitutional requirements. For a nation which stands for full equality under the law—which solemnly believes that all men are equal before the law, regardless of race, religion, or place of national origin—the result undoubtedly is permanent. It must be our hope that persons who oppose the decision will see the wisdom and the compelling need, in the national interest, of working out reasonable ways to comply.

In our system of government, of course, the Constitution is the supreme law of the land and it is the function of the judiciary to expound it. This is the very cornerstone of our federal system. As Hamilton stressed in *The Federalist*, "the want of a judiciary power" was "the circumstance which crown[ed] the defects of the [Articles of] Confederation."[6] These difficulties were obviated, in the words of Chief Justice Stone, "by making the Constitution the supreme law of the land and leaving its interpretation to the courts."[7]

The unanimous decision of the Court in the recent school cases thus represents the law of the land for today, tomorrow and, I am convinced for the future—for all regions and for all people. There are, to be sure, those who strongly oppose the result—a circumstance more or less true of most court decrees. However, the opposition and resentment caused by this decision in the school cases is much more serious, widespread and deep-seated than that caused by any court decision in recent times.

No one should try to minimize the problems of local adjustment posed in certain areas by these decisions. All of us must be mindful that for some communities the principle of law declared is one which runs against long ingrained habits, customs, and practices, which were thought to be consistent with the Constitution. We must remember and comprehend the significance of the fact that for more than five decades these communities had reason to rely upon *Plessy* v. *Ferguson*,[8] which enunciated the concept of "separate but equal". To be unmindful of this is to be unreasonable and unrealistic.

The Supreme Court's 1955 opinion in *Brown* v. *Board of Education*,[9] dealing with the question of relief, itself recognized that a period of transition would be required and that it would be an unwise procedure to prescribe a uniform period for compliance without regard to varying local conditions. At the same time, however, it must be remembered that the rights declared by the Court are personal and present rights. "It should go without saying", the Court declared, that "constitutional principles cannot be allowed to yield simply because of disagreement with them."

It should be remembered and constantly kept in mind that the Court laid down no hard and fast rules about the transition from segregated to nonsegregated schools. The Court did not set forth any inflexible rules about when or how this was to be done. It left the method of change and the length of time required to meet the test of "all deliberate speed" with due regard for varying local conditions, to the local school boards under the supervision of the local federal courts.

The crux of the matter then is one of intention. The problems are difficult at best but they become hazardous if the underlying intent of those who are opposed to the decision of the Court—particularly those in official positions who are opposed to the decision—is one of defiance. For the reasons I have mentioned, time and understanding are necessary ingredients to any long term solution. But time to work out constructive measures in an honest effort to comply is one thing; time used as a cloak to achieve complete defiance of the law of the land is quite another.

Let me turn then to the question of compliance and to the respective roles of state and nation.

Integration . . . A Local Responsibility

The responsibility for carrying out the principle declared in *Brown* v. *Board of Education* is primarily that of local officials and of the local community, subject, of course, to the supervision of the courts when the matter is in litigation. In remanding the school cases to the lower courts for further proceedings, the Supreme Court instructed those courts to require that the local school authorities involved "make a prompt and reasonable start toward full compliance". It also directed that the trial courts consider the adequacy of any plans that the school boards might propose as a means of "effectuat[ing] a transition to a racially nondiscriminatory school system".

The United States was not a party to the school cases. The immediate parties were plaintiff school children on the one hand and local school authorities on the other. The United States appeared only in the Supreme Court, at the invitation of the Court. The Court made it clear in its opinion that the means of implementing the decision—the accommodations of the various local communities throughout the nation to the constitutional principle declared—were to be worked out at the local level. Latitude and flexibility are there, provided only that the means adopted are "consistent with good faith compliance at the earliest practicable date".

The Executive Branch of your government does not appear in district court proceedings conducted for purposes of determining whether a proposed school plan is adequate or whether an existing plan should be modified. The details of implementation are for the parties directly involved and for the local court. If such plan as may be approved by the courts is thereupon carried out, there can, of course, be no occasion for participation by the Department of Justice. There is hope that this will be the prevailing pattern and that implementation will go forward consistently with the requirements of law and order and the

6. The Federalist, No. 22 at 138 (Mod. Lib. ed. 1937).
7. LAW AND ITS ADMINISTRATION (1924), page 138.
8. 163 U. S. 537.
9. 349 U. S. 294.

dictates of good citizenship and good sense. As the President stated last Wednesday, "The common sense of the individual and his civic responsibility must eventually come into play if we are to solve this problem."

There have been a few instances in which we have participated in court actions, not in connection with a proposed school plan, but in order to assure proper respect for law and order and for the decrees of the United States district courts.

One instance of participation by the Executive Branch of the Federal Government in the enforcement of orders of a federal court is a case which arose in Clinton, Tennessee. In compliance with a court order, a number of Negroes had been admitted, without incident, to the Clinton High School. Several days later, John Kasper, an agitator for the Seaboard White Citizens Council, arrived to organize concerted obstruction. His purpose was to frustrate the district court's order and to exert pressure upon the school board to dismiss the Negro students. At the petition of members of the school board, the court enjoined Kasper from further hindering or obstructing the approved plan. Kasper refused to comply and continued to incite mob action aimed at subverting the court's decree. He was thereupon charged with criminal contempt, again at the instance of the school board members. At this point the United States Attorney, who had not been in the case since it had involved only the predominantly "local" question of formulating an appropriate plan of integration, was requested by the court to participate in the investigation and prosecution of the criminal contempt charge. This was done and Kasper was convicted and the conviction sustained on appeal.[10]

An example of still another way in which the Federal Government has participated in helping to overcome violent interference with a plan of integration is the Hoxie, Arkansas, case. Promptly after the Supreme Court's decisions, the Hoxie school board, finding no administrative obstacle to immediate desegregation, announced that the schools in that district would be open to white and colored children alike. This was met, however, by threats and acts of violence designed to coerce the school board to rescind its action. The board and its members responded by an action in the federal district court to enjoin the agitators from interfering with the desegregation of the Hoxie schools and from threatening or intimidating the school board members in the performance of their duties. The injunction was granted, but the defendants appealed on the grounds that no federal rights were involved and that the federal courts had no jurisdiction. The appeal thus raised the broad question whether state officials can be protected in the federal courts from interference with their performance of a duty imposed upon them by the Federal Constitution. Because of the effect the decision would have upon the procedures available for dealing with obstructions to duly adopted plans of desegregation, the United States, at the request of the school board and with the consent of all the parties, appeared and filed a brief in the court of appeals in support of the power of the federal courts. The injunction was affirmed.[11]

The general policy of the Federal Government under the present law is that it does not institute proceedings to alter the practices followed in the nation's countless school systems. Moreover, if a complaint on behalf of local school children is filed on the ground that the school system in a particular community operates in discriminatory fashion, and this contention is sustained, we regard the matter of formulating an appropriate remedial plan as the responsibility of the local litigants and the local court.

On the other hand, if there is concerted and substantial interference, as in the *Kasper* case, with the decree of the court, we stand prepared to take such steps as may be necessary to vindicate the court's authority, for example, to aid the court in the prosecution of a contempt charge. We are prepared to assist the courts in other ways—as in the *Hoxie* case, where, at the request of the local school board, we submitted our views on an important question involving the formulation of effective federal procedures for dealing with threatened obstruction

William P. Rogers

of law and order.

This brings me finally to the most serious situation, and one which all Americans solemnly hope will never occur again. I refer to the case where a state impedes the execution of a court's final decree in one of two ways: (1) under the guise of preventing disorder it uses state military forces in a manner calculated to obstruct a final order of the court, or (2) where a state fails to provide adequate police protection to those whose rights have been determined by final decree of the court and as a result "domestic violence, unlawful combination or conspiracy"[12] hinders the exercise of those rights.

When a group of private persons engages in a concerted effort to obstruct the execution of a court decree, application for an injunction and, if necessary, the institution of contempt proceedings, will ordinarily prove effective. That is illustrated by the *Kasper* case. In Clinton, Tennessee, however, there had been no breakdown of local law enforcement machinery. Local authorities stood ready, able and willing to prevent violence and to protect the individual citizen. If local law enforcement breaks down and mob rule supplants state authority, the situation is immeasurably more serious. In that situation, it may not be enough to go back to the courts for further relief in the form of an injunction, a process which is necessarily

10. 245 F. 2d 92 (6th Cir.), certiorari denied, 355 U. S. 834.
11. 238 F. 2d 91 (8th Cir).
12. Section 333, Title 10, United States Code.

time-consuming. A mob does not always wait.

Let me make it emphatically clear that the maintenance of order in the local community is the primary responsibility of the state. That responsibility cannot be shifted. When a court has entered a decree, the state has a solemn duty not to impede its execution. More than that, it has the affirmative responsibility of maintaining order so that the rights of individuals, as determined by the courts, are protected against violence and lawlessness. But what if a state fails to meet this responsibility? It means that persons who oppose the decision of the Court, if they can muster enough force, can set the Court's decree at naught.

If this occurs, there can be no equivocation. President Eisenhower has clearly stated on two occasions.

> The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts.

Each state, I believe, is fully capable of maintaining law and order within the state. There is no state, granting the will, which cannot maintain law and order and at the same time permit a final decree of a court to be carried out. This being so, no further occasion need arise—none should ever be permitted to arise—which would require the Federal Government to act to support and insure the carrying out of a final decision of a federal court.

Responsible state officials must exercise wisdom and foresight to prevent violence and the defiance of court decrees. Our nation pays a heavy price for such disorder both at home and abroad—particularly when it is the product of an attempt to deny to fellow American citizens rights duly determined by our courts.

In any civilization based upon ordered liberty, it is fundamental, in the words of John Locke, a favored philosopher of the founding fathers, that "no man in civil society can be exempted from the laws of it".[13] By the same token, no man can be excepted from the requirement of respecting the lawfully determined rights of others. Every thoughtful and responsible person knows this to be true. I earnestly call upon you as officers of our courts, as leaders of the Bar, and as the respected counselors of your communities to insure that this fundamental truth shall not be lost upon your fellow citizens—more than that, that it shall not even be temporarily obscured.

In summary then let me restate these conclusions:

(1) The decision of the Supreme Court in the school cases and in related fields is the law of the land.

(2) Compliance with the law of the land is inevitable. As the President said last Wednesday, "Every American must understand that if an individual, a community, or a state is going successfully and continuously to defy the court then there will be anarchy."

(3) In the final analysis, therefore, it is vital in the national interest that there be thoughtful compliance in conformity with the general guideline laid down by the Supreme Court and in a manner specifically worked out by local authority under supervision of the local federal courts.

(4) Whenever good faith efforts to comply have been made by local and state officials, substantial progress has been made without serious incident.

(5) Each state has the clear, affirmative duty to use its police power so that the lawfully determined rights of all persons are protected against violence and lawlessness.

(6) Most states have made it clear that they are able to and intend to perform this duty. If each state performs its duty the occasion should never arise, and I am sure that all of us fervently hope that it will not arise, when the ultimate duty would fall upon the Executive Branch of government "to support and insure the carrying out of the final decision of the federal court".

(7) We in the Executive Branch stand ready at all times in a spirit of co-operation to consult with state officials in a search for solutions consistent with the decisions of the Court.

The problems I have discussed here today present a serious challenge to all Americans in the days ahead. With an awareness of the gravity of these problems which face our nation there is but one course to pursue. We are one nation, with total dedication to the rule of law. We must always remain so.

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13. John Locke, CONCERNING CIVIL GOVERNMENT, Chapter VIII, Sec. 94.

The School Segregation Cases:

A Legal Error That Should Be Corrected

by Charles J. Bloch • *of the Georgia Bar (Macon)*

In this article, Mr. Bloch undertakes to answer the position set forth by Attorney General Rogers in his address before the Assembly of the American Bar Association in Los Angeles (published at page 23 of this issue of the *Journal.*) Mr. Bloch feels that the Attorney General is ignoring long-established constitutional doctrine, particularly judicial constructions of the Fourteenth Amendment practically contemporaneous with its ratification, when he says that the Supreme Court's decision is the "law of the land".

I was graduated from the University of Georgia in 1913. I was admitted to the Bar of Georgia in 1914. I was admitted to the Bar of the Supreme Court of the United States on December 18, 1918. I have been practicing law in Georgia for almost forty-five years. Maybe those dates only demonstrate that I am old fashioned. So is the Constitution. It is a century older than I am, but "equal" means the same today and meant the same in 1954 as it did in 1927, 1893 and 1789.

When I was in college, we were taught what I still believe to be the "law of the land". We were taught that the plain mandates of the Constitution, the Ark of the Covenant, were to be obeyed, not evaded. We were taught that the power of the courts and the duty of the courts, were to construe the Constitution, not to amend it or distort it to conform to their personal notions and beliefs.

Conditions in the world of 1893-1913 were not static any more than they have been in the world of 1938-1958. But no attempt was in those days made to amend the Constitution by judicial fiat or decree. If the changed conditions required a change in the organic law, the organic law was not stultified and destroyed in order to accomplish the change. The organic law was amended in the manner provided in it.

In 1895, the Supreme Court of the United States in an opinion written by Chief Justice Fuller, with Justices Harlan, Brown, Jackson and White dissenting, held that an income tax law passed by the Congress was unconstitutional. Said the Chief Justice, with whom Justices Field, Gray, Brewer and Shiras concurred:

> It is the duty of the Court in this case simply to determine whether the income tax now before it does or does not belong to the class of direct taxes, and if it does, to decide the constitutional question which follows accordingly, *unaffected by considerations, not pertaining to the case in hand.*[1]

There was a great hue and cry over that decision. Populists did not like it. Southerners did not like it. The farmers of the great West did not like it. About the only segment of the population which did like it was that segment concentrated in the northeastern section of the country.

Justice Field retired from the Court in 1897; Justice Gray in 1902; Justice Brewer in 1910. Other gentlemen succeeded them as Justices. But no attempt was made to have a new Court amend the Constitution by reversing the *Income Tax* case of 1895.

The meaning of the provisions of the constitutional provision as to the power of Congress to levy taxes had "take [n] on meaning and content as" it was "interpreted and applied in" that specific case.[2]

Legal Amendment . . . Not Usurpation of Power

The Constitution provided for its own legal amendment. That method was followed, and eighteen years later, the Sixteenth Amendment supplanted the decision of the Court. The organic law remained unwounded. It had been amended by due and legal process, and not by usurped power.

The Fourteenth Amendment to the Constitution of the United States, proclaimed in 1868, in its first section, thus ordains:

1. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 601.
2. *Cf.* the Attorney General's Washington speech, proposition Second.

> *All* persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States. Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws [italics added].

The Constitution of the State of Missouri provided that male citizens should be entitled to vote.

In this situation, Mrs. Minor, a native-born, free, white citizen of Missouri, over 21 years of age, sought to vote. She asserted that she had that right because of the Fourteenth Amendment. The case reached the Supreme Court. Chief Justice Waite speaking for a unanimous Court denied her the right to vote, saying:

> Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to decide what it should be . . . If the law is wrong, it ought to be changed, but the power for that is not in us. The arguments addressed to us bearing upon such a view of the subject may perhaps be sufficient to induce those having the power, to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we find it is within the power of a State to withhold.

So spoke Chief Justice Waite, and Associate Justices Clifford, Miller, Field, Bradley, Swayne, Davis, Strong and Hunt in 1874.[3] Very soon, some of those Justices died; vacancies occurred on the Court. By 1897, not one was left. But there was no effort made to have the new Court, in the light of changed circumstances of women, their new power, the psychological effect upon them of not being permitted to vote, their entering the field of business and finance, to reverse and repeal its former decision. The admonition of the Court was heeded. The appeal was made to Congress and the states. The Nineteenth Amendment to the Constitution was, by the prescribed, legal, constitutional method, submitted to the states. Forty-four years after *Minor* v. *Happersett*, female citizens legally and constitutionally secured the right to vote.

Jurists and lawyers of that day were taught:

> Legislatures may alter or change their laws, without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be no longer considered doubtful, or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments.[4]

The Brown *Case . . . A Shocking Reversal*

Should the law of the land there declared be different in a situation where the states of the South had spent literally billions of dollars upon the idea that the Constitution when amended in 1868 did not affect their rights to maintain separate but equal public schools?

Paraphrasing *Minor* v. *Happersett*, for nearly ninety years the people of the South had acted upon the idea, repeatedly and unanimously decided by the courts of the land, that the states had the right, in regulating their public schools, to separate the races therein.[5]

Is it any wonder, therefore, that the people of the South were shocked, that every student of constitutional law was shocked, when on May 17, 1954, the Court announced "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"?

The Court ignored every rule of law when it made the quoted announcement which was the very opposite of the holdings on the very same question which has "been many times decided to be within the Constitutional power of the State Legislature to settle, without intervention of the federal courts under the federal Constitution".

So spoke Chief Justice Taft for a unanimous Court in 1927.[6]

In support of that holding there were cited, not the opinions of psychologists, but of the courts of Massachusetts, Ohio, New York, California, Kansas, North Carolina, Indiana, Missouri, Arizona and Nevada, as well as the opinions of three federal courts.

In support of that holding there were cited, not the opinions of modern psychologists, but the adjudications of learned jurists made over a period extending from 1849 to 1900. The people of the South trusted their government. It was on the faith of those solemn judicial constructions of the Constitution that the people of the South, emerging from the ravages of war and reconstruction, spent literally billions of the dollars of their tax revenues, garnered from the properties of their own citizens, for the operation and construction of their own schools.

Does anyone for a moment think that if the South had thought the 1927 opinion of Chief Justice Taft was subject to a reversal based on the opinions of psychologists it would have constructed this vast public school system?

In his Los Angeles speech the Attorney General said: "The ultimate issue becomes the role of law itself in our society; whether the law of the land is supreme or whether it may be evaded or defied."

Why did not the Department of Justice in 1952 and 1953 and 1954, when these *School Segregation* cases were pending in the Supreme Court, say to the Court: "The law of the land is supreme. The ultimate issue is the

3. *Minor* v. *Happersett*, 21 Wall. 162, 177-8.
4. *Minnesota Mining Co.* v. *National Mining Co.*, 3 Wall. 332, 334.
5. *Gong Lum* v. *Rice*, 275 U.S. 78, 87.
6. 275 U.S. 78, 86.

role of law itself in our society. The law of the land as to the question now before you has in the language of a unanimous Court, 'been many times decided to be within the constitutional power of the State Legislature to settle, without intervention of the federal courts under the federal Constitution.' "

Why did not the Department of Justice then say to the Court: "The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment."

That was the supreme law of the land as declared for over a century before May 17, 1954.

Perhaps, if the Department of Justice had so advised the Court, the law of the land would not have been evaded or changed by the Court.

How can the Department of Justice now tell the South that it is evading or defying the law of the land when the South is trying only to have redeclared what has been the law of the land for over a century?

In his Los Angeles speech, the Attorney General says that the May 17, 1954, decision was foreshadowed by earlier holdings. If it was so foreshadowed, it is all the more a reason why the Department of Justice, really anxious to keep the supreme law of the land from being evaded and defied, should in 1952 and 1953 and 1954, have stepped in, and told the Court that the question under consideration had been decided, and that the decision had been established as the law of the land for over ninety years.

Such a statement might not have been politically expedient, but it would have been in accord with the Department's present sentiments as to what the South should do.

The Attorney General, in the foreshadowing phase of his speech, referred to the Court's opinion delivered through Chief Justice Hughes with reference to the Negro living in Missouri who sought admission to the Law School of the University of Missouri. The Attorney General said of this case that "The constitutional requirement of 'equal protection of the laws' was not deemed satisfied by the state's offer to pay tuition at a school of comparable standing in a nearby state." The Attorney General did not mention the fact that in that case,[7] decided in 1938, the Supreme Court distinctly recognized the "separate but equal doctrine" as being a part of the law of the land.

Mr. Chief Justice Hughes there said: ". . . the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. *The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions.*" [8]

And further, said Chief Justice Hughes: ". . . the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity." [9]

All that the Court held there was that the "separate but equal doctrine" which it recognized as a part of the law of the land was not satisfied by Missouri's offer to pay the Negro's tuition at a law school of comparable standing in a nearby state.

There was nothing in that decision to foreshadow that the Court, differently constituted, would sixteen years later say "that in the field of public education the doctrine of 'separate but equal' has no place".

"Separate But Equal". . . The Law of the Land in 1938

The decision of 1938 recognized the separate but equal doctrine as a part of the law of the land.

The decision of 1954 nullified it.

In discussing the 1950 Texas law school case,[10] the Attorney General failed to state that there the Court refused to disturb the findings of the Court in *Plessy* v. *Ferguson*. What the Court did do was to recognize the "separate but equal" doctrine as generally stated and applied, but to hold that there could not be a separate but equal *law school* because of factors incapable of objective measurement which make for greatness in a law school.

At Los Angeles, the Attorney General said that since May 17, 1954, holdings of the Supreme Court and of the lower federal courts emphasize that a state may not engage in other forms of segregation, for example in providing recreational facilities and in public transportation.

Revolutionary as it was, conflicting with the law of the land as it did, the scope of *Brown* v. *Topeka*, and its companion cases of May 17, 1954, was confined to public education.

In the cases decided on May 17, 1954, the plaintiffs contended only that segregated public schools are not "equal", and cannot be made equal. Argument was had at the 1952 term and the 1953 term. The Attorney General of the United States then in office participated both terms as *amicus curiae*. One wonders why the Attorney General, either as *amicus curiae* or *magister curiae*, did not inform the Court that the question raised by the plaintiffs had long since been settled by repeated decisions of state courts of last resort alluded to by Chief Justice Taft [11] in *Gong Lum* v. *Rice*, by the

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7. *Missouri* ex rel. *Gaines* v. *Canada*, 305 U.S. 337.
8. *Op. cit.* page 344.
9. *Op. cit.* page 351.
10. *Sweatt* v. *Painter*, 339 U.S. 629.
11. *State of Ohio* ex rel. *Garnes* v. *McCann*, 21 Ohio St. 198, 211; *Cory* v. *Carter*, 48 Ind. 327; *King* v. *Gallagher*, 93 N.Y. 438; *Ward* v. *Flood*, 48 Cal. 36, among others.

unanimous opinion of the Court in *Gong Lum* v. *Rice*, as well as by the Supreme Court in *Plessy v. Ferguson*,[12] and *Cummings* v. *Board of Education*.[13] One wonders why a Department of Justice which now insists that the decisions of May 17, 1954, are the law of the land, did not prior to May 17, 1954, insist with equal vigor that the century-old, unanimous holdings establishing the "separate but equal doctrine" constituted the law of the land. Why did the Department of Justice permit the Court to destroy this established "law of the land" without a murmur of protest?

The only question raised and decided on May 17, 1954, pertained to public education. When the Court on May 17, 1954, said that the separate but equal doctrine did not make its appearance in the Court until 1896 in the case of *Plessy* v. *Ferguson* "involving not education but transportation", and that "American courts had since labored with the doctrine for over half a century", why did not the Department of Justice, upholder as it is of the law of the land, advise the Court, teach the Court, that the separate but equal doctrine, involving *not* transportation but education, had made its appearance in and been established by the courts of Massachusetts, Ohio, Indiana, California and New York in an unbroken line of decisions beginning a half century prior to 1896. The Department of Justice should not, as an upholder and defender of the law of the land, have permitted Justice Frankfurter, Justice Burton, Justice Minton, Chief Justice Warren and Justice Jackson to remain in ignorance of what the courts of their home states had decided long before *Plessy* v. *Ferguson*.

Repeatedly in its opinion of May 17, 1954, did the Court use explicit language demonstrating that it was considering only "whether *Plessy* v. *Ferguson* should be held inapplicable to public education".[14] Distinctly did it "conclude that in the field of public education, the doctrine of 'separate but equal' has no place", and that "any language in *Plessy* v. *Ferguson* contrary to this finding is rejected".[15]

The Law of the Land . . . Amended by the Judiciary

Insofar as the "separate but equal" doctrine applied to other forms of segregation, for example, in the providing of recreational facilities and in public transportation, the separate but equal doctrine indisputably undisturbed by the decisions of May 17, 1954, remained the law of the land. Nevertheless, the Department of Justice without an apparent murmur of protest has permitted the law of the land to be destroyed by the application of *Brown* v. *Topeka* to totally unrelated cases.[16] The first case to apply the doctrine of the school cases to any other form of segregation was one involving bathing beaches.[17] The City of Baltimore appealed. There was a "motion to affirm" made, and on November 7, 1955, "*per curiam*" the motion to affirm was granted, and the judgment affirmed. So, without opinion, with the stroke of a pen, was the "law of the land" as it had existed for over half a century judicially amended. Apparently, there was not even an argument of the grave questions before the Supreme Court on appeal. The strident voices of today as to the "law of the land" were strangely silent three years ago when this repeal by the Judiciary was taking place. The Supreme Court has never seen fit to consider thoroughly and discuss thoroughly any of the lower court cases which have destroyed the law of the land by expanding the doctrine of the school segregation cases.[18]

Why has the Supreme Court permitted its plain ruling in the school cases of 1954 to be distorted and extended beyond their original scope?

Is the established "law of the land" so to be destroyed in all fields of jurisprudence in the future?

Will the Department of Justice remain silent witness to such destruction and then lecture free citizens of the United States who complain of such judicial repeal?

Are not American lawyers interested in such questions of fundamental law quite aside from their views on segregation?

The Attorney General said, too, in Los Angeles: "The unanimous decision of the Court in the recent school cases thus represents the law of the land for today, tomorrow, and I am convinced, for the future, for all regions and for all people."

This theory was not true as to Texas voting laws. In 1935, the law of the land was so declared as to render these laws valid and constitutional.[19] Nine years later, that declaration was reversed without the change of a syllable having been made in the organic or statute law.[20] That theory was not true as to *Plessy* v. *Ferguson*. That theory was not true as to *Gong Lum* v. *Rice*. That theory was not true as to the restrictive covenant cases. That theory was not true as to any case if the members of the Supreme Court are free to cut the pattern of the established law of the land to fit the wishes of a majority or a vociferous, clamoring minority at any given time.

The Attorney General and all others who have treated the school segregation cases as establishing an immutable principle designated by a catch phrase as the "law of the land" have entirely overlooked or ignored the fact that these four state cases had as their foundation, a "finding" as to the effect on colored children of their being separated from the white children. Any lawyer reading the opinion in those cases will find it perfectly clear that the basis of the ruling of the Supreme Court was the findings of fact made by the courts below in the Kansas [21] and Delaware [22] cases which were reviewed along with the South Carolina and Virginia cases. If that factual basis is eliminated, the so-called conclusion of law falls. What appear to be basic questions of constitutional law really are not. The legal questions there apparently decided were based on findings of fact of two of the cases which were assumed to apply in the other two cases.

It may well be that in the future a

(Continued on page 97)

12. 163 U.S. 537.
13. 175 U.S. 528.
14. 347 U.S. at page 492.
15. 347 U.S. at pages 494-5 (see also 349 U.S. at page 298).
16. *E.g.*, *Dawson* v. *Baltimore*, 220 F. 2d 386; 350 U.S. 877.
17. *Ibid.*
18. See 347 U.S. 974; 350 U.S. 879, 352 U.S. 903.
19. 295 U.S. 45.
20. 321 U.S. 649.
21. 347 U.S. page 492, note 9; 347 U.S. page 494.
22. 347 U.S. page 494, note 10.

A Contribution to Public Welfare:

The National Interprofessional Code

by Richard Hartshorne • *Judge of the U.S. District Court for the District of New Jersey*

Judge Hartshorne describes the purposes and the provisions of the new National Interprofessional Code for Physicians and Attorneys, approved this past summer by the American Medical Association and the American Bar Association. The Code itself is published following Judge Hartshorne's article.

This summer, at their respective annual meetings,[1] both the American Bar Association and the American Medical Association adopted the National Interprofessional Code, not as laws, but as "suggested rules of conduct" for the members of both professions. The importance of this Code is made evident by the single fact that cases involving personal injuries occur more often throughout the courts of the United States than cases of any other class. Indeed, if, added thereto, we consider the thousands upon thousands of such cases handled by all our workmen's compensation bureaus, it is a question whether personal injuries are not the subject of more litigation than cases of all other kinds combined. Obviously, therefore, a better understanding of the mutual needs and obligations of the lawyer and the doctor will aid their co-operation with each other, or, as the Code itself says, it will "promote[s] the public welfare, improve[s] the practical relationships of the two professions, and facilitate[s] the administration of justice".

To achieve this purpose, the Code briefly and clearly states the general principles for this co-operation between the two professions as to medical reports, conferences between the lawyer and doctor, subpoenas for medical witnesses, arrangement for court appearances, the appearance of the physician as a witness in court, and the physician's fees for services relating to litigation and their payment. In short, it covers the relations between the lawyer and the doctor before, and all the way through, the litigated case, including the court's control of the case. In the first place, the Code stresses the importance of a "complete medical report" by the doctor to the lawyer, not only for the purpose of trial, but to aid in obtaining a proper settlement. Similarly, it recommends "discussion in advance of the trial between the physician and the attorney", so that the rights of the client and patient may be fully known and adequately presented, both at settlement conferences and at trial.

Thereafter the Code turns to what is perhaps the most troublesome of all situations involving both lawyers and doctors—the matter of assuring the attendance of the physician at court, to give testimony at the trial. This testimony is, of course, essential in order to ascertain the damages claimed by plaintiff as a result of the alleged tort. Indeed, this medical testimony is often necessary to establish whether or not the damages claimed were caused by the alleged tort. Thus the doctor is an indispensable witness at all these trials. The trial simply cannot be successfully concluded without him. Yet all trial courts, and doubtless all trial attorneys, will agree that the greatest difficulty is often experienced in obtaining the attendance of the physician at court during the trial.

This difficulty doubtless has two causes: first, the demands of the doctor's own practice; second, the doctor's lack of understanding that, as to his treatment of the injured person and his previous diagnosis of the medical situation, he is a fact witness, not a technical expert witness, and as such is subject to the command of a subpoena or a subpoena *duces tecum* for the production of his pertinent records.

On the other hand, if, as is ordinarily the case, the attorney wants the doctor to testify not only as to the past facts in the case, but also to give his present medical diagnosis of the situation and his prognosis as to the patient's future, he then, in that regard, becomes not a fact, but an expert witness. As such he can then insist, if he so desires, that he be compensated as an expert before he answers any such

1. The American Medical Association took action at its annual sessions at San Francisco in June; the American Bar Association took action at its annual sessions at Los Angeles in August.

expert questions.

Both these points of possible misunderstanding on the part of the average physician will therefore be made much clearer to him by the statement of the Code, approved by his own nationwide professional association, that "the duty of the physician is the same as that of any other person to respond to judicial process". This principle is re-enforced by the further recognition of the Code that "the conduct of the business of the courts cannot depend upon the convenience of litigants, lawyers, or witnesses", be they medical or otherwise.

The Public Welfare . . . The Needs of the Doctor

Thus the Code properly protects "the public welfare" in that it "facilitates the administration of justice". On the other hand, it clearly indicates that the lawyer should have due regard to the needs of the doctor in his private practice when the lawyer obtains the aid of the court by a subpoena in insuring the attendance at the trial of the medical witnesses. For the Code provides that before issuing any such subpoena the lawyer should confer with the doctor in that regard, and, if a subpoena appears necessary, the lawyer should "take into consideration the professional demands upon his [the doctor's] time", including advising the doctor as to approximately when and for how long he will have to attend court. In other words, "the attorney should make every effort to conserve the time of the physician".

Furthermore, when in court "the attorney and the physician should treat one another with dignity and respect". Indeed, the Code thereby implies a word of advice to the judge, *i.e.*, he should not permit either the lawyer or the doctor to embarrass or harass each other, but should enforce the established rules of evidence, which are amply effective "to test the qualifications, competence and credibility of a medical witness". On the other hand, the doctor when in court "should frankly state his medical opinion . . . should never be an advocate, and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury".

Again, the Code recognizes that just as the attorney is entitled to compensation by his client for his services, both preceding and at the trial, so is the doctor "entitled to reasonable compensation for time spent in conferences, preparation of medical reports, and for court or other appearances", and that this fee should not be a contingent one. On the other hand, the doctor has no right to insist upon the payment of these fees before he appears in court in response to a subpoena. His duty to the court, representing the public, is quite separate from and superior to his relations with either his patient or the attorney. But at the same time the Code recognizes that "the attorney should do everything possible to assure payment for services rendered by the physician for himself and his client", including requesting "permission of the patient to pay the physician from any recovery". Thus the Code is carefully drawn to cover, with fairness, the needs and obligations of the members of both professions in the handling of all litigated cases, both before, at and after trial.

Of course, since many doctors and lawyers are not members of either the American Medical Association or the American Bar Association, and are thus not parties to these suggested rules of conduct as adopted by these two associations, the Code itself suggests, in order to make these rules effective as well to those other members of the two professions, that the Code be adopted at state and local levels, in the event that similar action has not already been taken there. In fact, on October 15, the Medicolegal Society of New Jersey adopted the above suggestion of the Code by having it considered at its meeting and by voting to recommend it to the favorable attention of both the New Jersey state and county bar and medical associations. Obviously, a consideration of the fairness to each profession of the rules of conduct set forth in this National Interprofessional Code is the best recommendation for such action. Indeed, when it is borne in mind that the Special Committee To Cooperate with the American Medical Association,[2] appointed by the American Bar Association, has held a series of conferences all over the country for an entire year with the similar committee appointed by the American Medical Association,[3] it would seem that the Bar and the medical profession owed a real debt of gratitude to these two committees for their arduous and helpful work in aid of both professions. Furthermore, when such implementation at state and local levels is undertaken, it will be borne in mind that any change in the wording of this Code, so far as that locality is concerned, will simply nullify this present nationwide compact, arrived at by these two professions after this long and careful mutual study, and create a separate, purely local, compact. Of course, it can only create uncertainty on the part of both lawyers and doctors if different compacts are entered into in different localities throughout the country. Thus, it would seem wise not to undertake changes in this Code over a mere choice of words, or phraseology, or for other than really important matters of principle.

In addition to laying down these helpful principles for the conduct of the two professions in the handling of litigation, the Code further deplores the airing, in public, "of any complaint or criticism by a member of one profession against the other profession, or any of its members". Such criticisms naturally tend to lessen public confidence in both professions. This doubtless refers not only to the criticism recently aired by certain members of the medical profession as to the large amount of medical malpractice litigation instituted relatively recently in a certain section of the country, but also to certain criticism, even more widely discussed, as to the difficulties often experienced in inducing medical witnesses to appear for the plaintiff in malpractice cases. Since the simplest

2. The members of the committee appointed by the American Bar Association were Frank C. Haymond, President Judge of the West Virginia Supreme Court, Chairman; Joseph H. Gordon, of Tacoma, Washington; Fred B. Helms, of Charlotte, North Carolina; Lewis C. Ryan, of Syracuse, New York; Bernard G. Segal, of Philadelphia, Pennsylvania.

3. The members of this committee were Dr. David B. Allman, of Atlantic City, New Jersey, then President of the American Medical Association; Dr. George Fister, of Ogden, Utah; Dr. Hugh Hussey, of Washington, D. C.; and C. Joseph Stetler, of Chicago, Illinois, Director of the American Medical Association's Law Department.

means for ascertaining the soundness of such criticisms and the readiest remedy therefor lies in the hands of the association of the profession which is criticized, the Code calls for the reference of such complaints or criticism, and even as to a violation of the Code itself, to that association for its prompt and adequate attention. This also would seem to be a sound rule of conduct for the members of the two professions.

All things considered, it would seem that this National Interprofessional Code for Physicians and Attorneys will largely aid in achieving its purpose of promoting the public welfare, improving the practical working relationships between the two professions, and facilitating the administration of justice. Both the American Bar Association and the American Medical Association are to be congratulated on this practical contribution to the welfare of not only the legal and medical professions, but of the public of the entire country as well.

National Interprofessional Code for Physicians and Attorneys

Preamble

The provisions of this Code are intended as guides for physicians and attorneys in their inter-related practice in the areas covered by its provisions. They are not laws, but suggested rules of conduct for members of the two professions, subject to the principles of medical and legal ethics and the rules of law prescribed for their individual conduct.

This Code constitutes the recognition that, with the growing interrelationship of medicine and law, it is inevitable that physicians and attorneys will be drawn into steadily increasing association. It will serve its purpose if it promotes the public welfare, improves the practical working relationships of the two professions, and facilitates the administration of justice.

Medical Reports

The physicians upon proper authorization should promptly furnish the attorney with a complete medical report and should realize that delays in providing medical information may prejudice the opportunity of the patient either to settle his claim or suit, delay the trial of a case or cause additional expense or the loss of important testimony.

The attorney should give the physician reasonable notice of the need for a report and clearly specify the medical information which he seeks.

It is improper for the attorney to abuse a medical witness or to seek to influence his medical opinion. Established rules of evidence afford ample opportunity to test the qualifications, competence and credibility of a medical witness; and it is always improper and unnecessary for the attorney to embarrass or harass the physician.

Fees for Services of Physician Relative to Litigation

The physician is entitled to reasonable compensation for time spent in conferences, preparation of medical reports and for court or other appearances. These are proper and necessary items of expense in litigation involving medical questions. The amount of the physician's fee should never be contingent upon the outcome of the case or the amount of damages awarded.

Payment of Medical Fees

The attorney should do everything possible to assure payment for services rendered by the physician for himself or his client. When the physician has not been fully paid the attorney should request permission of the patient to pay the physician from any recovery which the attorney may receive in behalf of the patient.

Implementation of This Code at State and Local Levels

In the event similar action has not already been taken this Code should, in the public interest, be appropriately implemented at state and local levels for the purpose of improving the interprofessional relationship between the legal and medical professions.

Consideration and Disposition of Complaints

The public airing of any complaint or criticism by a member of one profession against the other profession or any of its members is to be deplored. Such complaints or criticism, including complaints of the violation of the principles of this Code, should be referred by the complaining doctor or lawyer through his own association to the appropriate association of the other profession; and all such complaints or criticism should be promptly and adequately processed by the association receiving them.

Conferences

It is the duty of each profession to present fairly and adequately the medical information involved in legal controversies. To that end the practice of discussion in advance of the trial between the physician and the attorney is encouraged and recommended. Such discussion should be had in all instances unless it is mutually agreed that it is unnecessary.

Conferences should be held at a time and place mutually convenient to the parties. The attorney and the physician should fully disclose and discuss the medical information involved in the controversy.

Subpoena for Medical Witness

Because of conditions in a particular case or jurisdiction or because of the necessity for protecting himself or his

client, the attorney is sometimes required to subpoena the physician as a witness. Although the physician should not take offense at being subpoenaed, the attorney should not cause the subpoena to be issued without prior notification to the physician. The duty of the physician is the same as that of any other person to respond to judicial process.

Arrangement for Court Appearances

While it is recognized that the conduct of the business of the courts cannot depend upon the convenience of litigants, lawyers or witnesses, arrangements can and should be made for the attendance of the physician as a witness which take into consideration the professional demands upon his time. Such arrangements contemplate reasonable notice to the physician of the intention to call him as a witness and to advise him by telephone, after the trial has commenced, of the approximate time of his required attendance. The attorney should make every effort to conserve the time of the physician.

Physician Called as Witness

The attorney and the physician should treat one another with dignity and respect in the courtroom. The physician should testify solely as to the medical facts in the case and should frankly state his medical opinion. He should never be an advocate and should realize that his testimony is intended to enlighten rather than to impress or prejudice the court or the jury.

An Early Trial:

Circumstantial Evidence—1637

by Richard F. Hamill

In John Winthrop's *Journal*, covering the early years of the Massachusetts Bay Colony, there is the story of a murder and the sort of evidence upon which the murderer was convicted. Under the date of July 28, 1637, Governor Winthrop gives a detailed account of the affair.

Two men were hanged in Boston on that day. One of them was a convict who had killed another convict who had broken prison with him. But let the words of the *Journal* tell the story:

"The other, William Schooler, was a vintner in London, and had been a common adulterer (as himself did confess,) and had wounded a man in a duel, for which he fled into the Low Country, and from thence he fled from his captain and came into this country, leaving his wife (a handsome, neat woman) in England. He lived with another fellow at Merrimack, and there being a poor maid at Newbury, one Mary Sholy, who had desired a guide to go with her to her master, who dwelt at Pascataquack, he inquired her out and agreed, for fifteen shillings, to conduct her thither. But, two days after, he returned, and, being asked why he returned so soon, he answered, that he had carried her within two or three miles of the place, and then she would go no farther. Being examined for this by the magistrates at Ipswich, and no proof found against him, he was let go. But, about a year after, being impressed to go against the Pequods, he gave ill speeches, for which the governor sent warrant for him, and being apprehended, (and supposed it had been for the death of the maid, some spake what they had heard, which might occasion suspicion,) he was again examined, and divers witnesses produced about it. Whereupon he was committed, arraigned and condemned, by due proceeding. The effect of the evidence was this:—

"1. He had lived a vicious life, and now lived like an atheist.

"2. He had sought out the maid, and undertook to carry her to a place where he had never been.

Richard F. Hamill is now retired and lives near Fredericksburg, Virginia. He has taught American literature and coached at small colleges in West Virginia and Texas and once wrote light verse published in nationally known humor magazines.

"3. When he crossed Merrimack, he landed in a place three miles from the usual path, from whence it was scarce possible she should get into the path.

"4. He said he went by Winicowett

(Continued on page 74)

Let's Give the Employees a Voice:

Legislation Regulating Union Strike Votes

by **George O. Bahrs** • *of the California Bar (San Francisco)*

Mr. Bahrs believes that some sweeping changes ought to be made in the federal legislation regulating union voting. An elaborate system is provided in the Taft-Hartley Act to protect the rights of employees to form or join unions and to bargain collectively, he points out, but once the union has been chosen as the collective bargaining representative, there is no regulation that ensures that the employees continue to have a voice in the affairs of the union or a chance to vote on such vital issues as a strike or the termination of a strike.

During its last session Congress wrestled with some of the problems created by certain excesses and vices found to exist within the ranks of organized labor. The legislative proposals which were submitted however were almost entirely ineffectual and hardly scratched the surface. They deal with symptoms but not underlying causes.

These attempts at legislation on this subject are reminiscent of earlier stages in the legislative history of our present laws regulating collective bargaining. The first law enacted on this subject was the Wagner Act. This law was designed solely to bring the employer and the union representing his employees face to face across the bargaining table. After that, the law left the parties to their own devices.

Leaving them to their own devices did not work out successfully. The Wagner Act was completely one-sided. It was impossible for organized labor to violate it because there were no provisions in it regulating the activities of organized labor. Representatives of organized labor and many well-meaning liberals spoke in defense of the Wagner Act over a period of years and argued against any regulation of labor organizations by pleading for more time for labor unions to achieve maturity. They expressed the hope that, given time, labor would correct its own abuses and excesses.

These fond hopes were not realized. After patiently waiting for a considerable time, even the staunchest friends of organized labor in Congress finally concluded that organized labor was simply incapable of controlling and disciplining unions and union leaders within its ranks by voluntary means and decided that legislation was necessary to correct the most harmful abuses.

President Truman recommended legislation outlawing jurisdictional strikes. The Congress, however, went further than this and enacted the Taft-Hartley Act, which, in addition to outlawing jurisdictional strikes, forbade secondary strikes and boycotts and removed the protection of the law from the unionization of foremen and other supervisory employees.

But, while outlawing certain abuses, the Congress very carefully refrained from legislating concerning the internal affairs of unions. An illustration of this is to be found in Section 8 (b) (1) (A) of the Act, reading as follows:

> It shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

This legislative decision may have been a wise one at the time, but it certainly left many abuses and malpractices within unions unregulated and uncorrected.

As the law stands today, the Congress has gone to almost untold lengths to regulate and protect the rights of employees to form or join unions and to bargain collectively. Congress has enacted a law making it an unfair labor practice for employers to interfere with or for labor unions to coerce or restrain employees in the exercise of these rights. It has created the National Labor Relations Board to investigate violations of these rights and to issue cease-and-desist orders which are enforceable by the courts. The same Board is also authorized and directed to conduct secret ballot elections

so that employees will be guaranteed the opportunity to exercise their rights as the law contemplated. In protecting these rights the Board has on numerous occasions ruled that statements or acts either by employers or unions, *although lawful and non-coercive*, have nevertheless prevented a fair election because they have *unduly influenced* the employees. In such cases the Board has set elections aside and ordered new ones.

With all this tender care and solicitude and detailed regulations governing representation elections where employees decide whether or not to join and be represented by unions, the Congress has made no effort whatever to regulate the internal affairs of unions after the employees become union members. This includes such parts of the collective bargaining process as reporting the negotiations to the employees and taking a vote of the employees on the question of whether to accept a proposed contract, to strike for better terms or to terminate a strike already in progress.

Employees' Protected . . . on One Question Only

Which is the more important? Should we provide this elaborate machinery only to guarantee that the wishes of the employees are respected on the question of whether or not they shall be union members, but leave entirely unregulated all other votes by them and provide no protection or guarantees that their wishes will be carried out and respected on all other questions including the question of whether or not to accept a contract or to strike?

Here is another point: When an election is held for the purpose of deciding whether or not employees wish to be represented by a union, one of the important questions which must be decided by the National Labor Relations Board is the *unit* for purposes of holding an election and conducting collective bargaining. This involves the question of what classes of employees shall be grouped together for purposes of the election and what members of these classes shall be eligible to vote.

Who determines what the "unit" will be in case of a *strike vote*? At present there is no legal provision covering this question. Usually the decision is made by the union leaders. This is not an unimportant or incidental decision, for the *outcome of the vote* can frequently be influenced by the composition of the unit which votes. Suppose that the union represents the employees of employers A, B and C. Suppose that the union bargains with employer C and reaches an impasse in the bargaining. It is less likely that the employees will vote to strike if the vote is confined to the employees of employer C alone because they are the ones who will be obliged to bear the brunt of the strike. On the other hand, if the vote is taken by the entire membership of the union, the employees of A and B may vote in favor of the strike in order to secure a higher wage level at C's plant, which will subsequently be passed on to them without the necessity of their going out on strike themselves. In the parlance of the trade this is known as "Let's have a strike at your house."

Point No. 1: There is no statutory provision whatever for determining which employees are eligible to participate in strike votes. There is not even any legal provision that the voting will be limited to the employees who are represented in the particular negotiations and who are covered by the contract the union is trying to secure. This applies to some of the biggest unions and the biggest strikes in the country.

A second matter of great importance is the manner in which employees are informed as to the issues on which they are expected to vote. In the vast majority of cases at present this is done solely through their union leaders. Is this wise, or even good common sense?

In local, state and national elections, before it is time for the citizen to vote, he is handed a sample ballot which states clearly the proposition on which he is expected to vote. There also usually appears on the sample ballots a short printed "Argument for the Measure" and an "Argument against the Measure". The voter has time to think it over and talk it over with his wife before he casts his ballot even though this may involve something which affects him only indirectly, such as authorizing bonds to build a new school or a new library or some similar measure.

On the issue of whether the men shall continue working or shall go out on strike, *nothing* similar to this is provided or required by law—even involving strikes so large and important that they could paralyze a substantial part of our economy.

There is nothing comparable to the printed "argument for" or "argument against" the measure on the state ballot. Unbelievable as this may seem, the employer is obliged to present *his* side of the case to the membership of the union *through the union leader*. The union leader presents *both sides of the case* to the membership at their meeting before they vote whether or not to strike. After the employer and the union leader have wrangled bitterly across the bargaining table the employer is obliged to employ *his adversary* as his own spokesman to present his side of the case to his own employees. It is difficult to imagine a scheme less likely to produce a fair presentation or an equitable result.

Point No. 2: No provision whatever is made by law that the employees will have the issues presented to them clearly, honestly and accurately before they vote on going out on strike. Moreover, there is no legal provision that the employees will have the benefit of hearing or reading arguments on *both* sides of the case before making up their minds on this important question.

Next, there is no provision of law that the questions involved will be freely and fairly debated by the union membership before taking a strike vote. An aggressive union leader can completely control a large union of several thousand members with only a small well organized clique. These are the skilled debaters—sometimes rabble rousers—who take the floor and grab the microphones and who make the arguments. At the right time they are recognized by the chair, they make the motions, second the motions and the show is on the road. The important thing is that they are *organized*. They have a plan of action previously agreed upon and they carry it out. The vast majority of the membership may be

out of sympathy with the program but they have no real opportunity to express their wishes because they are not organized. They are "steam-rollered" by the organized clique and the union meeting is stampeded because the law does not provide any regulation whatever for the conduct of internal affairs of unions nor does it contain any guarantee that union members can express their wishes in open meetings with impunity from reprisal.

It is amazing how few employers realize that they are "wasting their shots" in elaborate communications programs through the medium of newspaper, radio and direct mail appeal to their employees. So long as the union is dominated by an organized clique these efforts are useless. At present the *unorganized* majority of employees are *powerless* to act within their own union.

Point No. 3: There is no legal guarantee or requirement that the merits of both sides of the issue will be openly and fairly discussed and debated by the membership before being submitted to a vote.

Union Leadership . . . Tricks and Devices

Under present conditions there are many tricks and devices by which the desired objectives of union leaders can be accomplished. An ancient device is the simple expedient of waiting until most of the members have gotten tired and gone home, leaving only a few of the "faithful" in attendance before bringing up an important issue for vote. Another device frequently used is the "vote of confidence", namely, passing a resolution at the very beginning of the negotiations, appointing a negotiating committee, and "giving it full power to act, including calling a strike".

Because of the entire absence of any legal regulation, it is possible to call for a standing vote of the union membership when, because of the size of the hall and lack of accommodations, half of the members are already standing. It is also possible to require the ballots to be marked in the presence of union officials. On one occasion, even when voting machines were used, it was reported that some of the officials stepped inside the voting booth with the voter "to be sure he knew how to work the machine".

In addition to having no legal safeguards insuring the secrecy of the ballot, there are no legal provisions whatever insuring that the ballots will be honestly and accurately tallied.

Point No. 4: There is not even any guarantee by law that the union members can freely register their wishes by means of secret ballots or that their votes will be honestly counted.

By law we have fostered and developed the growth of giant unions with enormous powers. By law we have authorized contracts which require men to become and remain members of these unions in order to work at their trade and to earn their livelihood. Yet we have done nothing whatever to guarantee by law that these men will have a real voice in deciding what they shall demand, what they shall accept and what they shall strike for.

The guaranteed secret ballot would have a profound effect on collective bargaining by limiting the strike issues to things that the *employees want* as distinguished from things that their leaders want for "prestige purposes".

Men become union leaders because of an intense desire for leadership. They believe and proclaim themselves to be leaders. It is that quality which has driven such men as Harry Bridges, Walter Reuther, Jimmie Hoffa and John L. Lewis to the top of their unions. Such qualities do not result in the "shrinking violet" type of personality. When men such as these become heads of unions we not infrequently have a situation where each union leader tries to outdo the gains secured by rivals. This is "prestige bargaining". In many cases the union leaders make demands far beyond what their membership would be perfectly willing to accept and these leaders insist on enforcing these demands through prolonged strikes at the expense of their members in order to outdo a rival union leader.

The figures have shown over and over again that it takes years for the individual union members to recover from the losses they have suffered through such strikes. Sometimes they never recover from these losses or hardships. If they had the opportunity to weigh the advantages and disadvantages of the strikes and to register their wishes in a manner so that their wishes would be carried out, many "prestige strikes" would be averted or at least shortened. Not only would the union members be spared from these losses and hardships, but the public would also be spared a great deal of unnecessary loss and hardship.

George O. Bahrs is a graduate of the Hastings College of Law (LL.B. 1923) who practices in San Francisco. He taught law part-time at Hastings from 1926 to 1941, and now devotes most of his time to labor law matters.

An Unfortunate Experiment... The War Labor Disputes Act

It is true that we have already done a little legislative experimenting along these lines when Congress enacted the Smith-Connally Act, better known as the War Labor Disputes Act. Some features of this legislation have been carried over into the Taft-Hartley Act but limited in their application to national emergency strikes.

Let us make no bones about it. The Smith-Connally Act was by no means an overwhelming success. It was a wartime measure which provided for a government-supervised secret vote of the employees on a question in some-

what the following form: "You would not be so unpatriotic at a time of national emergency as to go out on strike to secure your demands, would you?" Almost to a man the employees voted: "You bet we would!"

The unfortunate results of this experiment have provided a ready but specious argument to the opponents of supervised secret ballots. Let us examine the circumstances under which the War Labor Disputes Act experiment took place. It was a time of national emergency. The employees and their leaders *knew* that the Government would not permit a strike of any consequence to continue for any appreciable time in any important segment of industry. When the employees voted in favor of a strike under the War Labor Disputes Act they and their leaders were perfectly sure that Uncle Sam would step in and pay whatever price they demanded to get them back to work. Sure, they might not receive their demands in full, but they would certainly receive *something* as a result of voting in favor of a strike. They did not actually vote for a strike where they might be "out on the bricks" for an indefinite period. The strike vote was simply a pressure move. For this reason, by any fair or objective standard, the War Labor Disputes Act was not a fair trial of the secret ballot formula.

The second major defect in the legislation arises out of the fact that any legislative plan which is limited to a supervised secret ballot *before* taking a strike is entirely inadequate. Collective bargaining is a pressure game. It obviously involves considerable bluffing. At times it is pretty hard to tell whether a "final offer" is really the "last offer" or the "next to last offer". Sometimes the only way a union can find out where the employer has drawn the line and intends to fight it out is to take a token strike of a few days.

Under such circumstances, to give the employees a secret vote on the question of *calling* a strike but not giving them the same rights on *terminating* the strike and on indicating at what terms they are willing to settle simply makes them helpless pawns of their leaders once they are out on strike and makes the whole secret strike vote procedure a farce. It indicates that the problem has simply not been thought through.

There are those who believe that the way to improve labor relations is to weaken labor organizations. Before we try to "improve" labor relations by weakening or hamstringing *all* unions, both good and bad, we should make an earnest and intelligent effort to make the collective bargaining process work by accurately registering and carrying out the wishes of the employees themselves.

There are "sophisticates" who believe that this is a dangerous and unsafe proposal. They would rather have union memberships led and controlled by experienced and conservative leaders. Union members, however, are neither morons nor incompetents and do not require the protection or guidance of guardians. The average American working man is a pretty reasonable and sound individual. Over and over again his political votes have been more conservative than those called for by his leaders. We need not fear entrusting the decisions to the employees themselves. After all, they are the *principals*, and the unions are merely their collective bargaining *agents*.

We wish to make it clear that there are many unions that conduct their membership meetings and their labor negotiations and their strike votes according to the highest standards. On the other hand, there are many unions that do not, and the importance of this problem is sufficiently great to warrant investigation and action by Congress.

A formula to safeguard and supervise secret votes by union members cannot be worked out overnight. It would require the most careful consideration and extended hearings by Congress. An invitation by Congress addressed to the membership of unions asking them to reveal abuses and misconduct inside unions in calling and in settling strikes would provide some extremely interesting and valuable material.

This proposal is not a panacea. Employers who think that they will get just about everything they want in collective bargaining if such a measure is passed are due for a rude awakening. Their employees have ideas of their own.

On the other hand, the proposal is not anti-labor. Any doubts on this score can be readily solved by consulting the employees themselves. Ask *them* how they feel about it.

Resolving a Dilemma:

Congress Should Implement Integration

by **Ben W. Palmer** • ***of the Minnesota Bar (Minneapolis)***

Pointing out that the federal courts are already foundering under a tremendous backlog of cases and that, in any event, courts are not the best agencies to handle the complex sociological problems posed by the Supreme Court's decision to require integration of the races in the schools, Mr. Palmer proposes that Congress step in and create administrative tribunals to oversee the implementation of the Supreme Court's decree.

Congress should implement integration principles set forth by the Supreme Court by establishing a system of administrative tribunals to take advantage of the flexibility of administrative law.

When holding that racial discrimination in public education is unconstitutional, the Court restored the cases to the docket for further argument regarding formulation of decrees. On May 31, 1955, in *Brown* v. *Board of Education of Topeka* and other cases, 349 U.S. 294, the Court stated that it had requested further argument on the question of relief because the cases arose under different local conditions and their disposition would involve a variety of local problems. The Court said:

> Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.
>
> In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The cases were then remanded to the District Court "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases".

I submit for consideration the proposition that problems of integration should be worked out by administrative tribunals established pursuant to Act of Congress, subject to judicial

review as provided by the act, rather than to cast the burden of integration upon the District Courts.

Integration Cases . . . A Burden on the Courts

The Supreme Court itself as shown by quotations above recognizes the great variety of local situations that must be taken into consideration in achieving integration. The application of the constitutional principles laid down by the Court in specific situations may well involve thousands of cases. The federal courts cannot sustain the burden of such litigation.

The Supreme Court as of May 19, 1958, had 1013 cases on its appellate docket and 781 cases on its miscellaneous docket. Since cases generally get into the Court by the selective certiorari process, there is no doubt that they involve questions of great importance not only to litigants but more important than that, to the people of the United States. No doubt the flow of these cases will continue and will increase. To that flow should not be added a large number of integration cases nor should the judges of the Supreme Court be burdened with the study of a vast number of applications for certiorari in such cases.

As shown by the report of the Director of the Administrative Office of the United States Courts, Federal District Courts have the highest backlog in history: more than seventy-five thousand cases. Says Warren Olney III, director of the office:

> Not only is this the highest backlog in history, but it represents a case-load which will keep the federal trial courts busy for a year, even if not an additional civil case were filed and not an additional criminal indictment were returned. The inevitable result is that delays in the trial of cases in Federal Courts, which in some districts are already as high as four years, will be still further increased. During the coming year persons who file cases do not stand a ghost of a chance of having trials within a reasonable time. In many instances this will be simply a denial of justice.

This report shows that federal judges are working harder in a so far unsuccessful attempt to keep up with the backlog. Since 1941 the average district judge has increased the number of cases of which he disposes in a year from 169 to 231. But during the same period, the average backlog has gone up from 137 to 270 cases per judge.

Not only do the overburdened federal courts have no time for the determination of thousands of integration cases under the equity powers and pursuant to mandate of the Supreme Court, but they are not equipped to handle such problems.

The federal judge, with his stenographer and clerk, is not equipped to consider "problems related to administration, arising from the physical condition of the school plant, the school transportation, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of *local* laws and regulations which may be necessary in solving the foregoing problems".

The adversary system is not adaptable to the objective ascertainment of truth and to correct judgments in such cases. Far more than in the case where the court is confined to consideration of expert testimony supplied by the adversaries, the court or body attempting to implement the Supreme Court principles must have its own investigative power and staff. It must be able to direct and control objective research of local conditions and opinions and problems of enforcement. Such staff studies and reports would serve to moderate and stabilize adversary contentions surcharged with emotion. We know from experience that in adversary cases, the tendency of each side is to take an extreme position in the hope that any compromise to resolve the conflict will be more favorable to the party taking an extreme position. This tends to exacerbate rather than allay passions.

The Court itself has recognized that it is impossible suddenly to enforce a uniform rule of law in tens of thousands of school districts in diverse communities in the face of local problems of administration. This is true even in the case of school boards that sincerely desire to integrate.

One reason for the breakdown of national prohibition was, of course, opposition to it in many areas of the country. While acceptable generally in a state which was predominantly agricultural and perhaps previously a dry state, there were metropolitan areas in which enforcement became impossible. Any national law which affects the daily conduct of millions of people throughout the United States cannot hope to succeed if it be a Procrustean bed. There must be some flexibility in the administration of standards laid down by the Constitution as interpreted by the courts or laid down by Congress.

Equal Protection . . . A Job for Congress

Congress should exercise its constitutional power to enforce, by appropriate legislation, the equal protection of the laws of the Fourteenth Amendment. We learned from experience that the growing complexity of the economic structure in the United States required, as a practical matter, that administrative bodies be established to apply legislative standards and rules of conduct to particular factual situations from time to time. We learned that through laws of general application we could not effectively regulate such diverse matters as railroad rates, which should be reasonable, or trade and labor practices, which should be fair. We learned that these regulations could not be effectively administered except by administrative bodies. The determination of innumerable problems depends on infinitely varied factual situations. Promptness and efficiency are required on the basis of continuous expert and inexpensive procedures. These procedures are set up so as to secure immediate investigation and the application of statutory rules on the basis of a sound, practical judgment. Administrative procedures are much more adapted than the judicial to secure the quick solution of new and varied problems with practical and ready adjustment to social changes and with flexibility based on experience.

It is on the basis of these needs and principles that we had the vast growth of administrative tribunals and ad-

ministrative law. Constitutional objections to the delegation of powers were overcome by the courts. It was held that Congress might not only give authorization to determine specific facts, but might establish primary standards, devolving upon others the duty of carrying out the declared legislative policy, that is to fill up the details under the general provisions made by the legislature. The Interstate Commerce Commission was given power to fix reasonable rates. The Secretary of Agriculture was validly authorized to meet local conditions in his regulations. The Federal Trade Commission can determine what are "unfair methods of competition" and the Federal Communications Commission can take action to insure equality of radio broadcasting service. Agencies were given the power of investigation, separate from the power to take action. Executive officers were authorized to secure the exact effect intended by a congressional act by vesting discretion in them to make regulations interpreting the statute and directing the details of its execution.

Congressional standards were held sufficiently definite as to be constitutionally valid: to determine "just and reasonable rates" and "unreasonable obstructions to navigation", "public interest", "public convenience and necessity", and "protection of investors" and "undue discrimination in rates". The Interstate Commerce Commission is given the power to prevent "undue preferences" and to require suitable facilities for transportation of interstate commerce. Thus, an administrative body could determine whether the practice of an employer is unfair in that it interferes with the right of employees to form, join or assist in labor organizations of their own choosing.

It is true that Congress would have to establish the standards of legal obligation which would properly limit administrative bodies. It would have to set up rules of conduct or policy for application by the administrative body to a particular state of fact and it should require findings to show that such rules of conduct or policy apply to the particular type of fact set forth in the statute setting up the standards.

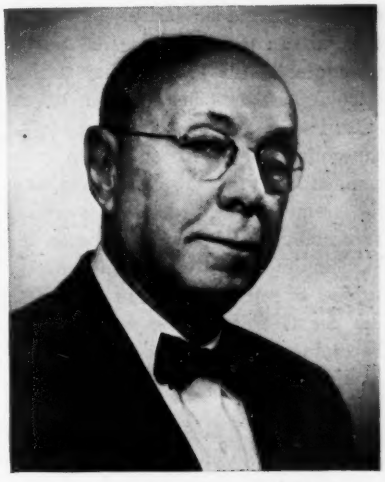
A Solution . . .
Administrative Agencies

Congress should consider authorizing the President to appoint administrative tribunals for integration for states, counties, municipalities or school districts. Consideration might also be given to the appointment of one overall national commission to supervise the work of the other administrative bodies within the states. Members of all commissions might be subject to removal by the President or by some officer given that authority. In appointing commissions, care could be taken to procure so far as possible local representatives of high standing and of moderate views and of sound discretion.

Legislation would include a persuasive preamble, a declaration of national policy and definitions of such terms as "integration" and "deliberate speed". It would set forth the requirements of notice of public hearings by the "integration councils", condition precedent to findings and orders. It would indicate the principal types and range of facts to be considered and included in required basic findings to support integration orders. Such facts, justifying the timing of integration of specific schools to be covered by successive orders, might include the number of pupils of each race or color in the school, the ratio of teachers to each, the adequacy of staff, creation of teachable groups, pupils' residences in relation to the location of the schools, curriculum, physical plant and equipment, particularly as related to integration problems, the cost of needed changes or additions to the plant, sources of funds to meet that cost and of maintenance revenues and social and economic conditions bearing on the timing and practicability of integration. Factors properly to be considered by a court of equity might also be indicated in general terms.

Commissions or administrative bodies should be given the power to investigate; to educate and inform the public, to determine administrative questions and apply the legislative mandates set out in the congressional act in specific cases. They should be required to accompany or base each opinion or order or rule upon specific or basic findings of fact. The agency should be given the subpoena power and the power to require forms of reports from school authorities and to investigate their records and activities. They might also be given the power to gather information by holding referenda and making them the basis of their determinations. They should be given the power to make rules and regulations to carry into effect the congressional will as expressed in the statute, that is the power to fill up the details. They should be given especially the power to prevent possible methods of evasion of the statutory law and deprivation of constitutional rights and the possible concealment of forbidden practices.

The statute should provide that when any of these administrative tribunals acts within its properly delegated discretion, its determinations should be conclusive so far as its findings of fact are concerned as supported by substantial evidence. Advantage, of course, should be taken of the doctrine of administrative finality announced first with reference to the Interstate Commerce Commission. The weight of the



Ben W. Palmer practices in Minneapolis. He is a graduate of the University of Minnesota and received his law degree *cum laude* from that school in 1913. He is a past president of the Hennepin County Bar Association.

evidence should be exclusively for the administrative agency as well as the soundness of its reasons, not subject to review by the courts. So far as constitutionally possible, the function of the courts should be limited to questions of law so as to relieve them from the tremendous burden of reviewing voluminous administrative records and vast bodies of fact and opinion on the subject of integration. This will relieve the courts from the responsibility of becoming sociological experts and making intensive investigations of detailed facts.

We cannot afford the bitterness of even a mild form of Reconstruction by means of federal bayonets or an army of United States marshals. We cannot afford the criticism of the courts that will inevitably result if they are flooded with thousands of cases which they are not in a position to handle efficiently and promptly. We should not overburden the Federal District Judges as many of them were overburdened during the days of prohibition enforcement when they complained that their courts became police courts. We should not place upon the judiciary the responsibility for a solution in detail of complex problems of administration and law enforcement in thousands of cases, and of sociological and economic fact finding for which they are not equipped. This is especially true when there is available an alternative method of a solution to the problem with all "deliberate speed" under federal control, but with local aid. We should take advantage of our experience with administrative tribunals and administrative law acquired both on the state and federal level since the Interstate Commerce Commission was established more than seventy years ago. A congressional approach to the solution of the problem will enable Congress with the aid of the best minds in the country to work out a judicious, sensible, just, peaceful and practicable solution of the complex problems involved in implementing the decisions of the Supreme Court of the United States.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1959 Annual Meeting and ending at the adjournment of the 1962 Annual Meeting:

Alabama	New Mexico
Alaska	North Carolina
California	North Dakota
Florida	Pennsylvania
Hawaii	Tennessee
Kansas	Vermont
Kentucky	Virginia
Massachusetts	Wisconsin
Missouri	

Nominating petitions for all State Delegates to be elected in 1959 must be filed with the Board of Elections not later than March 27, 1959. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt March 2) cannot be published prior to distribution of ballots, which will take place on or about April 10, 1959.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., March 27, 1959.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Walter V. Schaefer, *Chairman*
Harold L. Reeve
Robert B. Troutman

Searching the Federal Regulations:

Forty-Seven Steps Are Too Many

by Norman J. Futor • *of the Oklahoma Bar*

"Ignorance of the law excuses no man" John Selden said, but even lawyers who practice regularly before federal administrative agencies may be hard put to it to avoid being ignorant of the law—the law in this case being the current regulations promulgated by the appropriate agency. The Federal Register Act requires the publication of new regulations and amendments in the *Federal Register*, but Mr. Futor's article shows that this publication is far from being adequate. He proposes a new system of making available the regulations of the federal administrative agencies to all who need them.

The Forty-Seven Steps. If, at the time of receiving the *Federal Register* issue of Wednesday, February 27, 1957, one had attempted to locate the official version of the latest regulations issued by the Federal Communications Commission or Civil Aeronautics Board, forty-seven steps would have been necessary:

(1) Look up the section in the appropriate bound volume of the Code of Federal Regulations, using the subject-matter index if necessary.

(2) Check the section in the 1955 supplement to that bound volume.[1]

(3) Check the *Federal Register* index for the first quarter of 1956.

(4) Check the *Federal Register* index for the second quarter of 1956.

(5) Check the *Federal Register* index for the third quarter of 1956.

(6) Check the *Federal Register* index for the month of October, 1956.[2]

(7) Check the *Federal Register* index for the month of November, 1956.

(8) Check the *Federal Register* index for the month of December, 1956.

(9) through (29). Check the *Federal Register* index in each of twenty-one daily issues for January, 1957 (January 1, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 23, 24, 25, 26, 29, 30, 31).[3]

(30) through (47). Check the *Federal Register* index in each of eighteen daily issues for February, 1957 (February 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 26, 27).

Not a Current Daily Publication. After going through the forty-seven steps, one would still not be current. It is required that the *Federal Register* be mailed by 9:00 A.M. of the date of publication,[4] so the issue of Wednesday, February 27, 1957, would presumably have reached the subscriber on February 28 or March 1, containing no documents submitted by the agencies later than Thursday, February 21. The system requires that documents "shall be submitted three working days before the date on which publication is desired".[5] Wednesday, February 27, 1957, was the third working day after Thursday, February 21, since the latter date was followed by three non-working days; namely, a holiday (February 22, 1957) and Saturday and Sunday.[6] The *Federal Register* is not a current daily publication in the sense of the *Congressional Record* and the morning newspapers, which report the events of the previous day. While it is required by the Administrative Procedure Act that a regulation be published not less than thirty days prior to its effective date, that act allows an agency to dispense with advance notice "upon good cause shown",[7] so that one cannot always assume that thirty days' notice will be available.

Whether More or Less, It Still Isn't Good. Whether the year be 1957 or 1958, forty-seven steps will probably not be the maximum required, nor will it be the minimum. At different times, the number may be fifteen, twenty, thirty, forty, or fifty, depending on the dates that the various supplements and

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The views expressed are entirely those of the author and do not necessarily reflect the opinion of the Department of Justice.

1. 1956 Supplements were not available until these dates:
   Federal Communications Commission, May 6, 1957;
   Civil Aeronautics Board: Parts 1-39, September 25, 1957; Parts 40-399, August 6, 1957.

2. 1956 Annual Index for the FEDERAL REGISTER was not available until March 4, 1957.

3. January, 1957, Index for the FEDERAL REGISTER was not available until March 8, 1957.

4. 1 CFR 1.231.

5. 1 CFR 1.211 applies this requirement to all except presidential documents, in the absence of special preprint arrangements. It is seldom possible to effect such special preprint arrangements.

6. 1 CFR 1.214 makes provision for publishing the FEDERAL REGISTER from Tuesday through Saturday; i.e., the day *after* each government working day. There is no publication when one of those days follows a holiday; thus, no issue was published on Saturday, February 23, 1957.

7. 60 Stat. 238 (1946), 5 U.S.C.A. §1003(c) (Supp. 1957).

indices become available. But this much is certain: the system is not calculated to serve the convenience of the user.

Our Victorian System and the Need for a Change

There is a growing recognition of the fact that the present system is fundamentally unsound. The American Bar Association has sponsored an administrative practice bill which, while not dealing affirmatively with publishing, displays enough concern for the problem to indicate that consideration should be given to

> the feasibility of making the Code of Federal Regulations current by some loose-leaf system and making the whole service or any part or subpart thereof available nation-wide on subscription.[8]

The present system should be replaced with an integrated system designed to provide a compact set of current agency[9] regulations,[10] something that is not now available. A proposed integrated system will be described after a review of the origins and development of the present system and an analysis of its faults.[11] In connection with those faults, it should be said that there were, at one time, considerations which might be urged in justification of the present system, but those considerations no longer obtain.

The present method of official[12] publication was authorized by the Federal Register Act in a provision[13] for publication of all regulations in force, and a provision[14] for the publication of all notices and new regulations in a gazette. The intention[15] of the former provision was to parallel English publication of regulations in force, which was governed by the Rules Publication Act, 1893.[16] The intention[17] of the latter provision was to establish a gazette corresponding to the *London Gazette*.[18] Thus, the system adopted pursuant to those provisions was patterned after an English system developed in the Victorian era.

Why the Present System Was Adopted

By 1935, the adoption of an official system for publishing federal agency regulations was long overdue. As early as 1920, Professor Fairlie had pointed out that every bureau or local office had its own system or lack of system, that there was no uniformity in nomenclature, that the various levels and branches within an agency had no adequate system of distributing orders and regulations to one another, and that the citizen outside the government service had even more difficulty in keeping informed.[19]

In 1934, an article by Dean Griswold, while questioning the desirability of a gazette, pointed out that publication on the order of the English system would be preferable to the haphazard practices which obtained in the United States.[20] Congressman Celler, who introduced the measure which became the Federal Register Act, acknowledged his indebtedness to that article.[21]

In attempting to persuade Congress to pass the act, proponents of the measure had a powerful argument in the precedent of the English system, in operation since 1893. That argument would not have been available in behalf of a new and untried system. Proposal of a new system, no matter how logical or efficient, might have meant delay or defeat. And, in 1935, it appeared that neither delay nor defeat should be risked. A committee of the American Bar Association had criticized the absence of system;[22] and in December, 1934, the Supreme Court had indicated serious concern.[23] In urging passage of the act, Congressman Celler referred to these criticisms and described the situation as follows:[24]

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8. §110(d)(4) of H.R. 3350, 85th Cong., 1st Sess. (1957). A note in 43 A.B.A.J. 425 (May, 1957) sets forth the full text of the bill and reviews its background.

9. As used herein (unless otherwise indicated by context) the term "agency" means ". . . the President of the United States, or any executive department, independent board, establishment, bureau, agency, institution, commission, or separate office of the administrative branch of the Government of the United States. . ." See 49 Stat. 501 (1935), as amended, 44 U.S.C.A. §304 (Supp. 1957).

10. As used herein, the term "regulations" includes documents ". . . which are relied upon by the agency as authority for . . . its activities or functions. . ." See 49 Stat. 503 (1935), as amended, 44 U.S.C.A. §311(a) (Supp. 1957).

11. Outside the scope of this article is the question of whether the agencies have been submitting for publication all of the documents which should be published. On this, and related questions, see Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929 (1950). For a review of state legislation on administrative publications, see Harris, *Administrative Practice and Procedure—Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

12. No new regulation is valid against any person who does not have actual knowledge thereof, until it has been submitted by the agency to the Division of the Federal Register and placed on file by the Division, for public inspection, preparatory to publication in the FEDERAL REGISTER. 49 Stat. 502 (1935), as amended, 44 U.S.C.A. §307 (Supp. 1957). The Administrative Procedure Act requires that publication of a regulation be made not less than thirty days prior to the effective date thereof, except upon good cause shown. 60 Stat. 238 (1946), 5 U.S.C.A. §1003(c) (Supp. 1957). Regulations as published in the FEDERAL REGISTER and CODE OF FEDERAL REGULATIONS are prima facie evidence of the text of the original documents and are required to be judicially noticed. 49 Stat. 502 (1935), as amended, 67 Stat. 388 (1953), 44 U.S.C.A. §§307, 311(e) (Supp. 1957).

13. 49 Stat. 503 (1935) (later amended by 50 Stat. 304 (1937) which was in turn amended by 67 Stat. 388 (1953), 44 U.S.C.A. §311(a) (Supp. 1957)). After a new regulation is printed in the FEDERAL REGISTER, it is reprinted every year, along with related regulations, in a supplement to a bound volume of the Code of Federal Regulations, until the supplement gets large; then the regulations in force, contained in the bound volume and its supplement, are reprinted in a replacement volume. This procedure is governed by 1 CFR Chapter I.

14. 49 Stat. 500 (1935) (later amended by 70 Stat. 337 (1946), 44 U.S.C.A. §303 (Supp. 1957)).

15. See H.R. REP. No. 280, 74th Cong., 1st Sess. 2-3 (1935).

16. 56 & 57 Vict., c, 66. Unrelated categories of regulations were bound together and placed under an omnibus designation ("Statutory Rules and Orders"), with artificial major divisions called "titles", corresponding to the titles of the statutory code. See preface to second edition of STATUTORY RULES AND ORDERS (1904). A third edition was not published until 1949.

17. See 79 CONG. REC. 4788 (1935) and H.R. REP. No. 280, 74th Cong., 1st Sess. 2-3 (1935).

18. "Ever since the year of the Great Plague in the reign of Charles II, England has had the London Gazette, appearing twice a week, as a vehicle of official publicity. . ." Carr, ENGLISH ADMINISTRATIVE LAW 57 (1941). The FEDERAL REGISTER follows the LONDON GAZETTE in commingling the notices and regulations of all agencies. This results in a need for an elaborate indexing enterprise, involving the following indices each year: (a) 253 daily indices (there were 2,530 issues in the ten-year period 1947-56); (b) nine monthly indices: January, February, April, May, July, August, October, November, December; (c) three non-cumulative quarterly indices, for the quarters ending in March, June, and September; (d) an annual index. The FEDERAL REGISTER departs from its model, the LONDON GAZETTE, in that the latter does not publish a regulation unless the statute pursuant to which it is issued so requires.

19. Fairlie, *Administrative Legislation*, 18 MICH. L. R. 181, 199-200 (1920). The following extract from the article merits quotation:

> "In the matter of publication there is a maximum of variety and confusion. Not only is there no general system, but no department has developed a system for itself. Each bureau, and often each local office, has its own methods, or more often lack of method. . . . [S]pecial instructions may be issued in the form of mimeographed circulars or circular letters, or even in telegrams sent to certain officials which may never be reissued in any of the regular series.
>
> "There is no approach to uniformity in nomenclature. Rules, Regulations, Instructions, General Orders, Orders, Circulars, Bulletins, Notices, Memoranda and other terms are given to different series of publications by different government officers with no clear distinction as to the meaning of these terms. . . . Further difficulties arise [in that] . . . there is no uniformity in the form and methods of issuing . . . amendments.
>
> "Subordinate officials may ordinarily be supposed to receive the official publications from their own superiors bearing on their own work. Yet even here, there is sometimes a failure to prepare or to carry out an adequate system of distributing orders and regulations. . . . More difficult is the problem of one branch securing publications issued by another branch which may have an important bearing on its work.
>
> "For the citizen outside the government service, the problem of securing and keeping track of the administrative regulations which may affect his affairs is even more difficult . . ."

Some of the criticized practices are still being carried on.

20. Griswold, *Government in Ignorance of Law: A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198 (1934).

21. 80 CONG. REC. 3885 (1936).

22. 59 A.B.A. REP. 148, 540 (1934).

23. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

24. 79 CONG. REC. 4788 (1935). Congressman Celler's statements on the floor followed closely the language of H.R. REP. No. 280, 74th Cong., 1st Sess. 1-2 (1935) which he submitted to accompany the bill.

> . . . These administrative rules and proclamations oftentimes cannot be found. As to their publication and distribution, there is utter chaos. The rules and regulations frequently appear in separate paper pamphlets, some printed on single sheets of paper and easily lost. Any attempt to compile a complete private collection of these rules and regulations would be well-nigh impossible. No law library, public or private, contains them all. Officers of the Department issuing them frequently do not know all of their own regulations.

The circumstances surrounding the expression of concern by the Supreme Court have been summarized thus:

> . . . [I]n Panama Refining Co. v. Ryan, 293 U.S. 388 [1935], the Government was obliged to admit that the Executive Orders upon which it had proceeded below had been repealed by another Executive Order deposited with the State Department . . . At the argument [1934] . . . the Court, led by Mr. Justice Brandeis, subjected government counsel to a raking fire of criticism because of the failure of the Government to make Executive Orders available in official form. The Court refused to pass on some aspects of the case, and the result was the establishment of a Federal Register.[25]

Why There Has Been No Basic Change

Publication of notices and new regulations, pursuant to the Federal Register Act, began with the *Federal Register* issue of March 14, 1936. The *Federal Register* is published on the day after each Government business day.[26]

Publication of regulations in force encountered serious delay. Eighty to 90 per cent of the "compilations"[27] originally submitted by the agencies consisted of obsolete provisions, disorderly amendments and useless formal headings.[28] Therefore, the act was amended in 1937[29] to require that each agency submit a "codification" by July 1, 1938, and every fifth year thereafter, to be published as a "supplemental edition" of the *Federal Register*, under the editorial supervision of a six-man Codification Board.[30] After the "codifications" had been edited into some semblance of order, publication of the 1938 edition of the *Code of Federal Regulations* was finally completed in 1940.

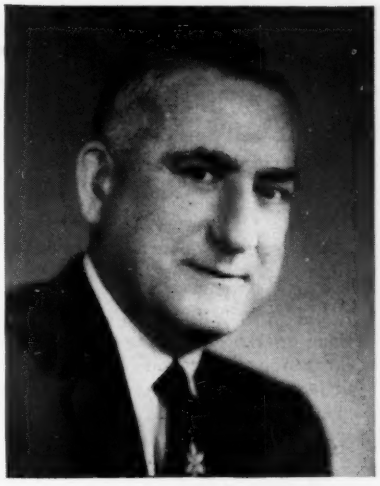
A wartime amendment suspended the quinquennial revision due in 1943 and provided that a five-year cumulative supplement should be issued.[31]

In 1948, a revision was again due.[32] There were, by then, ten years of supplements to the 1938 edition. Despite the great need for prompt issuance of the new edition, the budget was low, few people were available for the work and progress was not speedy.[33] Publication of the second edition (1949 ed.) was not completed until 1950. Thus, the second edition, like the first edition, was behind schedule through no fault of the Division of the Federal Register, and the Division could not be expected to give concern to development of a basic change in the system.

Since publication of the 1949 edition, revision of an individual volume takes place whenever its cumulative annual supplement gets too large.[34] Therefore, in 1953, the provision for quinquennial revision was dropped from the act.[35]

The Erroneous "Footnote" Concept of Regulations

The Need for Reappraisal. In an earlier day, an administrative agency was considered to function more or less as a clerical automaton which prepared regulations for deposit in the interstices of a comprehensive statutory structure. Accordingly, the English—in the 1890's—disregarded the individual identity of the agencies and blanketed all regulations under an omnibus designation, with artificial major divisions called "titles", corresponding to the titles of the statutory code.[36] In other words, regulations were viewed as little more than footnotes to the statutes. That approach was adopted in the Federal Register Act and the publications issued pursuant thereto. In 1935, the full implications of the expansion of federal functions which began in 1933 had not yet become apparent. But that expansion led to federal agency activity of an impressive level of volume and significance, and regulations developed a



Norman J. Futor came to Washington after military service in World War II. Before that, he had practiced law in Oklahoma City and had been an Assistant County Attorney and Assistant Attorney General of Oklahoma. He is a graduate of the University of Oklahoma (A.B., M.A., LL.B.) and is now in the Antitrust Division of the Department of Justice.

25. Mr. Justice Jackson concurring in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 320 (1953). See 1 CFR xxiii and *Hearings Before Subcommittee No. II of the House Committee on the Judiciary*, 74th Cong., 2d Sess., ser. 16, at 13, 19 (1936).

26. 1 CFR 1.214.

27. 49 Stat. 503 (1935) had required the agencies to submit "compilations" by January 26, 1936.

28. *Hearings Before Subcommittee No. II of the House Committee on the Judiciary*, 74th Cong., 2d Sess., ser. 16, at 25-29 (1936). See also H.R. Rep. No. 478, 75th Cong., 1st Sess. 1-3 (1937).

29. 50 Stat. 304 (1937). A bill providing for such an amendment was pending in 1936, but Congress took no action then. See statement of Congressman Celler at 80 Cong. Rec. 6658 (1936).

30. The Board consisted of the Director and two attorneys of the Federal Register Division, along with three attorneys of the Department of Justice. The latter three were dropped when the functions of the Board were transferred to the Division as of July 1, 1939. 53 Stat. 1435 (1939). A member of the Board, J. H. Ronald, writing in 1938 on *Publication of Federal Administrative Legislation*, 7 Geo. Wash. L. Rev. 52, 86, correctly predicted that "a system embracing the entire body of administrative legislation" would not be available "for several years". Ronald asserted that loose-leaf publication would "be of little value unless taken in connection with" such a complete system, and observed that "publication of the codification [even] without the loose-leaf feature is an ambitious project". Hart, *Exercise of Rule-Making Power*, in Report of President's Committee on Administrative Management 315, 346 (1937), had suggested loose-leaf regulations in slip form. The system proposed in the instant article contemplates individual sheets rather than slip form.

31. 56 Stat. 1045 (1942), 44 U.S.C.A. §311a (Supp. 1957).

32. The war-time suspension was terminated November 12, 1947. See H.R. Rep. No. 555, 83d Cong., 1st Sess. 2 (1953).

33. See *Hearings Before Subcommittee on Independent Offices of House Committee on Appropriations*, 80th Cong., 2d Sess. 584 (1948).

34. The proposal to issue cumulative annual supplements had received approval at a congressional committee hearing in 1948. *Id.* at 585-6.

35. 67 Stat. 388 (1953), 44 U.S.C.A. §311 (Supp. 1957).

36. See note 16, *supra*.

new order of importance. With the advantage of more than twenty years of experience, it is now clear that the nature of regulations should be reappraised, and that a different mode of organization should be employed. As the Supreme Court said in 1950:

> . . . It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature.[37]

The Modern Concept. Such foundation as the "footnote" concept may ever have had, has now crumbled away. The late Mr. Justice Jackson observed that administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking".[38] As a result, "within the limits of their respective competences, the administrative departments and agencies resemble a group of special legislative bodies".[39] It is, therefore, unsound to organize administrative regulations as if they were footnotes to the statutes. There is hardly more justification for doing so than there would be for blanketing the statutes of Congress with those of the state legislatures under an omnibus designation with major divisions corresponding to the titles of the United States Code.[40] Vom Baur has pointed out that administrative regulations are not homogeneous but "are scattered, in oddly shaped packages, throughout a variety of fields of substantive law and peculiar factual situations, with few common attributes".[41]

Conditions have changed since the 1890's, and it cannot now be considered that an administrative agency is ordinarily confined to the filling in of nooks and crannies in a three-dimensional statutory framework. More often the statute is merely an enabling act, constituting a one-dimensional point of departure, and the subject takes on significant dimensions only as categories of regulations are developed by the agency.

A Distinction Between Statutes and Regulations. Since all federal statutes are promulgated by the Congress, the major divisions (*i.e.*, the titles) of the United States Code must be somewhat artificial or arbitrary. A subjective element was involved in the original designation of major divisions and is involved in the allocation of specific statutes to those divisions, and this is inescapable. But in the case of regulations, each category constitutes a natural division. No subjective element need be involved in establishing divisions of the regulations, and there is no reason for having artificial or arbitrary divisions.[42]

The Procrustean Bed. In organizing federal agency regulations for the purpose of official publication, all categories were blanketed under an omnibus designation, with artificial major divisions which the Code of Federal Regulations, in its preface, called "titles closely paralleling the titles of the United States Code".[43] But the preface was in error—the titles do not correspond very well to anything. Twenty of the fifty[44] CFR titles departed completely from the statutory titles. And the other thirty CFR titles might better have made the departure—they have little relationship to the statutory titles beyond identity of name.[45] The statutory titles simply did not constitute an appropriate mode of organization for the varied categories of regulations.

Faulty Allocation of Titles. Nine[46] of the CFR titles average about twenty pages each, while five [47] of the titles run to thousands of pages each. Some of the most important categories of regulations thrown into those five titles do not even get a chapter—they are jammed into a subchapter.[48] When a lengthy and important body of regulations is crowded into a subchapter, the section numbers tend to be longer, and there are certain inconveniences in organization. Another unfortunate result has been described as follows:

> The . . . chapter numbering can be the cause of a great deal of confusion, since the agencies and their functions are continually being shifted from one department or bureau to another. When this is done, a new agency often falls heir to the old chapter and section numbers. Thus 24 CFR 202.13 (1938 ed.) refers to an entirely different agency and subject matter from the same section in the second edition, 1949 . . .[49]

Wasteful Reprinting and the Lack of Separate Availability

Excessive Reprinting. The present system requires that a regulation be reprinted in a new format over and over again:

(1) An old regulation is printed in a bound volume of the Code of Federal Regulations; and

(2) A new or amended regulation is printed

(a) first in the *Federal Register;* then

(b) reprinted *every year* in a supplement to a bound volume of the *Code of Federal Regulations*; and

(3) When the supplement gets unduly large, the regulations in force, contained in the bound volume and its supplement, are reprinted in a replacement volume. Thus, as of 1958, thirteen of the volumes of the 1949 edition of the Code of Federal Regulations

(Continued on page 99)

37. *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642 (1950).

38. Dissenting in *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470, 487 (1952).

39. Blachly and Oatman, ADMINISTRATIVE LEGISLATION AND ADJUDICATION 4 (1934).

40. While this might be useful on some occasions, the occasions would be so infrequent that such an arrangement would be impracticable.

41. 1 vom Baur, FEDERAL ADMINISTRATIVE LAW §1 (1942).

42. Such categories of regulations as the following are examples of natural divisions: "Economic Regulations", issued by the Civil Aeronautics Board; "Civil Air Regulations", issued by the same agency; patent regulations, issued through the Patent Office of the Department of Commerce; and aeronautics regulations, issued through the Civil Aeronautics Administration of the Department of Commerce. No one of these four categories has any necessary connection with any other category, but not one of them is separately available in the officially published regulations.

43. 1 CFR xxv, reprinting preface to CFR (1938 ed.). CFR titles did not "closely parallel" the statutory titles in either the first (1938) or second (1949) edition.

44. In addition to the titles numbered from 1 through 50, there is also a Title 32A (National Defense Appendix), paper bound and revised annually.

45. *E.g.*, Title 2 (Congress) has no regulations—it has only a tabulation showing sections of the United States Code cited as authority for issuance of regulations; and Title 11 (Bankruptcy) likewise has no regulations.

46. Titles 4, 11, 13, 23, 27, 28, 34, 40, and 48. If the subject matter in these titles had all been placed under a single miscellaneous title, eight titles could have been released for the use of more voluminous categories of regulations. Or better still, if the titles had not been limited to fifty, then a title could have been given to each category that needed one. Even after the original allocations were made, the materials could have been rearranged and the title numbers increased without creating confusion: the numbers "1" through "50" could have been abandoned and the title numbers could have begun with "101". But, even such a rearrangement could not have overcome the basic faults of the system.

47. Titles 7, 14, 32, 46, and 49.

48. *E.g.*, Civil Air Regulations (over a thousand pages) and Economic Regulations, of the Civil Aeronautics Board are each given a subchapter in Chapter I of Title 14. General Rules and Regulations (more than two thousand pages), Carriers by Motor Vehicle, and Carriers by Water, of the Interstate Commerce Commission are each given a subchapter in Chapter I of Title 49.

49. Price and Bitner, EFFECTIVE LEGAL RESEARCH 137 (1953).

Ten Years of Progress:

The Conference of Chief Justices

by **John R. Dethmers** • ***Chairman of the Conference of Chief Justices***

This is the address delivered by Chief Justice Dethmers, of the Supreme Court of Michigan, at the dinner held last August in Los Angeles in honor of the judiciary. The dinner is given annually by the Section of Judicial Administration. Chief Justice Dethmers summarizes the work of the Conference for the first ten years of its existence and a brief discussion of some of the major problems facing the nation's courts.

Ten years ago, leaders of the American Bar Association's Section of Judicial Administration conceived the idea of an organized conference of the states' Chief Justices. As a direct consequence, it came into formal existence the following year. The tenth annual meeting of the Conference of Chief Justices has just concluded.

Due to the extreme youth of our Conference, the old adage has been applicable that "children should be seen but not heard". Now having attained a coveted teen age, presumably an age of at least measured accountability, our Conference is called upon to be heard before you, I assume, for an accounting or report of its record, acts and accomplishments, which it seems altogether fitting that the new teen-ager should give to the Section which figured so largely in bringing it into being.

Formation of the Conference was prompted by the belief that it could become a forum of consultation at the highest level on means for overhauling and modernizing state court systems, and that it would afford the opportunity for comparing notes and pooling information on state judicial methods and problems, leading to improvements in court structure, organization and function in the several states. Organization of the Conference reflected the conviction that nowhere does a graver responsibility rest than on the courts, and particularly the courts of last resort themselves, for improving the administration of justice, making the judicial process more efficient, prompt and effective and rendering the courts more serviceable to the people. It was to these ends that the attention, efforts and resources of the Conference immediately were directed.

Fortunately, the Council of State Governments was persuaded, at the very beginning, to serve as its secretariat, and to conduct such research, studies and surveys, with reports thereon, as would further the purposes and aims of the Conference, and its staff has continued to serve in that capacity, faithfully and with distinction ever since. Disclosed by some of the earliest of the surveys and resultant reports was the fact that common to most states was a number of problems, as for example:

1. Too great decentralization of state court systems, with consequent confusing jurisdictional problems, inefficient methods and wasteful duplications in court management.

2. Need for more research assistants and other help in trial and appellate courts.

3. Lack of adequate statistics and docket information essential to devising means for increased efficiency and facility.

4. Deterrent to willingness of the best lawyers to accept judicial positions and to judicial independence inherent in inadequate compensation and retirement benefits and in systems of selection and tenure requiring aspirants to engage in political contests to gain and retain office.

5. Archaic rules of practice and procedure and a lack of the rule-making power in the courts, necessary to an enlightened and proper modernization of the rules.

Also forthcoming from the secretariat have been reports on such matters as:

A. Organization and procedure in the several state appellate courts;

B. Role of the trial courts in the various states;

C. The business management of courts;

D. Court administration in the states; and many others.

Discussions and deliberations of the members of the Conference at the annual meetings during the years have grappled with a wide range of subjects.

Typical are these:

1. Techniques of opinion writing, methods and means for speeding up the opinion filing process in the appellate courts and improving appellate procedures;

2. Simplification of rules of practice and procedure;

3. Acquiring data and making factual analyses as a prerequisite to programs for improving judicial administration;

4. Need for and establishment of the office of court administrator in the states;

5. Improvement of the organization and operation of the nation's local courts of first instance, on the level of the justice of the peace and magistrate courts;

6. Greater integration of state judicial structures;

7. Desirability of mandatory pretrial practice in all civil cases;

8. Judicial selection and tenure;

9. Judicial salaries and retirement provisions (parenthetically, a committee of our Conference met recently at the invitation of the National Conference of Bar Presidents, with a committee of theirs to consider this problem and implement assistance by that organization);

10. Federal writs of habeas corpus in state criminal cases;

11. Federal-state relationships as affected by judicial decisions.

It is not suggested that from these studies, reports, discussions and deliberations of the Conference and its secretariat, a ready solution has been found to all of the problems indicated nor a final and satisfactory conclusion on each of the subjects. Neither is it to be presumed that the improvements witnessed, during the life span of the Conference, in the administration of justice in the various states are solely due to the work of the Conference. At the same time, it is evident that the exchange of ideas, information as to new and better methods, and inspiration gained at the annual meetings, from speakers and associates, such as our revered departed member, Arthur T. Vanderbilt, and the facts and materials made available to us by the secretariat, to be translated into action at home, sent each of us back to our own state inspired, determined and armed with means for bringing about some of the desired changes. That included, in part, among the accomplishments in the states for which a measure of credit may fairly be ascribed to the program and work of the Conference:

1. Establishment of the office of court administrator in sixteen additional states since the Conference was founded, bringing the total from three to nineteen.

2. Extension of pretrial practice to jurisdictions in over half of the states.

3. Increased attention to and efforts to correct congested docket situations in the state courts.

4. Gaining increased public support for a new system of judicial selection and tenure, designed to eliminate partisan or other politics and to enhance the prospects and opportunities for an independent judiciary.

5. Substantial improvement in the area of judicial salaries and retirement benefits.

6. Adoption of new rules of practice and procedure in many states.

7. Establishment of judicial conferences or councils in many states, charged with the duty of making studies of court problems and recommendations for improvements through constitutional, statutory or rule changes.

8. Important at the 1958 meeting has been adoption of a resolution directing the Chairman to appoint a committee to study the allocation of judicial powers between state and federal courts and a possible revision of the Federal Judicial Code of 1875.

This list is by no means complete. Its direct and indirect accomplishments amply justify the continued existence of the Conference and augur well for even greater ones to come.

Mention has been made of the matter of the issue of writs of habeas corpus by United States District Courts in state criminal cases, after affirmance of conviction by state courts of last resort and, often, after denial of certiorari in the United States Supreme Court. Attendant delays, sometimes protracted and unreasonable, and the utter impropriety, as it seems to the Conference, of review of decisions of the state's final appellate courts by any other than the highest court in the land, have long disturbed us. A committee of the Conference has labored with representatives of the states' attorneys general, the United States Judicial Conference and the United States Department of Justice. Meeting jointly on at least two occasions, in the chambers of the United States Supreme Court in Washington, they were welcomed by the Chief Justice of the United States, who expressed his genuine interest in the problem and the hope that the joint efforts of the group would produce a proposed statutory amendment which would bring about a satisfactory solution. A bill was drafted agreeable to all represented in the meetings. It was introduced and passed the House last year, after which it died in the Senate Judiciary Committee. Again this year it passed the House, and near the end of the session was reported out favorably by the Senate Judiciary Committee. Since then, however, Congress has adjourned, with no further Senate action on the measure. We shall continue our labors in this connection.

Of transcendent importance to the nation, overshadowing all others in the concern of the Conference, is the matter of federal-state relationships as affected by judicial decisions. Increasingly, in recent years, members of the Conference had been expressing themselves in terms sharply critical of what they viewed as a trend in this area. Accordingly, at the sessions of the Conference in Dallas two years ago, the formal program was in large part devoted to the subject of the division of powers between the federal and state governments. In New York, last year, several members urged adoption of resolutions strongly condemnatory of that asserted trend. The majority, shunning hasty or precipitate action, determined on the appointment of a committee to devote the ensuing year to a study of the subject and to report to the 1958 session with recommendations for achieving sound and appropriate relationships. The committee, upon appointment, engaged the assistance of a number of law professors for research in several areas of the general subject. Each of them prepared an excellent monograph based on study and research on specific constitutional

questions and United States Supreme Court decisions relating thereto. These afforded much assistance to busy committee members. On such a foundation, the committee drafted a scholarly and comprehensive report. It was presented to the full Conference last Wednesday morning, as were personal reports by two of the professors; the Conference divided into four sections Wednesday afternoon for piecemeal consideration and discussion of the report, and at the concluding session, last Saturday, the Conference, by an overwhelming majority, adopted a resolution approving the report and making certain observations, expressions of belief, and recommendations in the premises. This did not come about in haste or in a spirit of rancor, but upon calm reflection, careful consideration and in a spirit of humility and love for American freedoms and our free institutions, with a view to calling attention, respectfully, to matters of grave concern to the Conference and to the country.

Time will not permit, nor is this the occasion for detailing the treatment in the report of specific phases of the subject and the decisions of the United States Supreme Court relating thereto. Copies of the report are available and we would commend it to the careful and appraising examination of each of you. In general, it expresses the concern of its framers and adopting members of the Conference over the constant expansion of the powers of the national government and consequent contraction of the powers of state and local governments, which result from Supreme Court interpretations of constitutional and statutory provisions. Note is taken of what is viewed as an assumption by the Court of the legislative function and the role of policy maker in this area of federal-state relationships.

Maintenance of the historic division of powers between national and state governments, and retention of the highest possible degree of local self-government compatible with national security and well-being, are deemed of the utmost importance by members of the Conference, as they were by the founding fathers, only as they serve as effective instrumentalities for the preservation of the liberties of the people and the perpetuation of our free institutions. No other, or sectional, interest was sought to be subserved by the report.

It is the feeling of the members of the Conference that, as judicial officers, entrusted by the people with positions of high responsibility and trust, they would be remiss in their duties, indeed, if they were to cower in a corner and neglect to speak out in temperate tone, to alert the public to trends and developments of tremendous moment to the people. Particularly is this true in view of the peculiar training, experience and contact with events that especially equip justices of the state appellate courts to discern such trends and to appreciate their significance. Where can it be said that greater obligation rests than on them to call public attention to a gradual sapping of state and local powers and rights, portending peril to the rights of the people? Inasmuch as the people must make the final judgments on these matters, existence of the problems and the involvements must be proclaimed. It is intended that the report shall serve that office.

Abraham Lincoln once said that resistance to decisions of the Supreme Court "meant an attack on our whole system of republican government, a blow that would place all our rights and liberties at the mercy of passion, anarchy and violence". The Conference has moved in full recognition of the utter importance of upholding public confidence in the courts and the judicial process, and the high duty of lawyers and judges to upbuild it. Constitutional guarantees of freedoms and liberties avail but little except as the courts breathe the breath of life into them and make them effective and meaningful. This they can only do, successfully, as they are supported by the public. As American Bar President Charles S. Rhyne has said so pointedly: "Our free institutions and system of government are no stronger than the public opinion supporting them." Accordingly, you will find the Conference report, despite certain newspaper headlines to the contrary, completely temperate and restrained, couched in terms of fullest respect for the United States Supreme Court as an institution of government charged with responsibility for giving life to human liberties, and also respect for the intelligence and integrity of the members of that Court.

John R. Dethmers has been a member of the Michigan Supreme Court since 1946. A native of Iowa, he was admitted to the Michigan Bar in 1927 and practiced in Holland. He was Attorney General of Michigan in 1945-1946.

At the same time, in a government by the people, views on vital national issues not only may, but must be voiced if that system is to be maintained. It will be recalled that Abraham Lincoln, also, in discussing the *Dred Scott* decision, said, "We know the Court that made it has often overruled its own decisions and we shall do what we can to have it overrule this. We offer no resistance to it." We do not forget that Mr. Justice David J. Brewer of the United States Supreme Court, speaking in 1898, said, "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism." The Conference report, so far from attacking the Court, expresses only its concern with certain of the decisions. It contains no applause for suggestions on the political front that the Court be stripped, by congressional action, of any of its traditional powers. The power of the Court to uphold and preserve human liberty and the rights of the

(Continued on page 97)

1959 ANNUAL MEETING

BAL HARBOUR/MIAMI BEACH, FLORIDA, AUGUST 24-28, 1959

The Eighty-Second Annual Meeting of the American Bar Association will be held in the Bal Harbour/Miami Beach Area, August 24-28, 1959. Further information with respect to the meeting will be published in the JOURNAL from time to time.

In requesting reservations, please note the necessity of remitting the Annual Meeting registration fee of $15.00, and of furnishing information as to your preference in hotels (first, second and third choice), definite arrival date and whether such arrival will be during the day or evening, and probable date of departure.

Applications for reservations will be accepted only from members of the Association and their guests.

Reservation confirmations will be mailed approximately ninety days before the meeting convenes.

HEADQUARTERS—THE AMERICANA HOTEL

HOTEL ACCOMMODATIONS, ALL WITH PRIVATE BATH, HAVE BEEN SECURED IN THE FOLLOWING AIR-CONDITIONED HOTELS. CURRENT RATES, AS FOLLOWS, MAY BE SUBJECT TO CHANGE.

Hotels and Motels	Single (For 1 person)	Double-bed or Twin-beds (For 2 persons)	Parlor, bedroom and bath
ALLISON—6261 Collins	$10.00 & $12.00	$10.00 & $12.00	
*AMERICANA—9701 Collins	$14.00-$24.00	$14.00-$24.00	$32.00 to $59.00
AZTEC MOTEL—15901 Collins	$12.00 & $14.00	$12.00 & $14.00	
BAL HARBOUR—10101 Collins	$14.00-$24.00	$14.00-$24.00	$40.00 & $48.00
BALMORAL—9801 Collins	$12.00-$22.00	$12.00-$22.00	$36.00-$48.00
BEAU RIVAGE—9929 Collins	$14.00-$24.00	$14.00-$24.00	$40.00
BEL AIRE—6515 Collins	$8.00	$10.00	
BILTMORE TERRACE—8701 Collins	$12.00-$16.00	$12.00-$16.00	$24.00-$28.00
BLUE HORIZON—8925 Collins	$8.00	$10.00 & $12.00	
CARILLON—6801 Collins	$14.00-$22.00	$14.00-$22.00	$40.00
CASABLANCA—6345 Collins	$10.00-$14.00	$10.00-$14.00	
COLONIAL INN MOTEL—18101 Collins	$12.00 & $14.00	$12.00 & $14.00	
COLONNADE—10155 Collins	$14.00-$24.00	$14.00-$24.00	$40.00 & $48.00
DEAUVILLE—6701 Collins	$14.00	$14.00-$24.00	$40.00-$50.00
DELMONICO—6393 Collins	$10.00-$14.00	$10.00-$14.00	
DUNES MOTEL—17001 Collins	$12.00 & $14.00	$12.00 & $14.00	
EDEN ROC—4525 Collins	$14.00-$20.00	$14.00-$20.00	27.00 & $60.00
FLORIDA SHORES—9449 Collins	$10.00 & $12.00	$10.00 & $12.00	$22.00
FONTAINEBLEAU—4441 Collins	$14.00-$24.00	$14.00-$24.00	$40.00-$50.00
GOLDEN GATE HOTEL—19400 Collins	$14.00	$14.00	$28.00
GOLDEN GATE MOTEL—19400 Collins	$12.00	$12.00	$24.00
IVANHOE—10175 Collins	$14.00-$24.00	$14.00-$24.00	$40.00 & $48.00
KENILWORTH—10205 Collins	$14.00-$24.00	$14.00-$24.00	$42.00 & $48.00
LOMBARDY—6305 Collins	$10.00-$14.00	$10.00-$14.00	
MALALUKA—9201 Collins	$8.00	$10.00 & $12.00	
MARTINIQUE—6423 Collins	$14.00	$14.00	
MONTE CARLO—6551 Collins	$10.00-$14.00	$10.00-$14.00	
SAFARI MOTEL—17749 Collins	$12.00 & $14.00	$12.00 & $14.00	
SINGAPORE—9601 Collins	$12.00-$20.00	$12.00-$20.00	$26.00-$38.00
THUNDERBIRD MOTEL—18401 Collins	$10.00-$16.00	$10.00-$16.00	

*Because of the limited accommodations available at the Americana, it is suggested that members designate another hotel as first choice. Second and third choice should also be designated, together with the number and type of room or rooms required; names and addresses of all persons who will occupy same, definite arrival date and whether such arrival will be during the day or evening; and probable date of departure.

Members who expect to arrive on early morning trains can avoid inconvenience of waiting for rooms by having reservations made for preceding evening and by paying for one additional day. Rooms reserved for morning arrival cannot be made available before midafternoon, unless voluntarily vacated by last occupant.

REGISTRATION FEE $15.00

REQUESTS FOR RESERVATIONS FOR HOTEL ACCOMMODATIONS SHOULD BE ACCOMPANIED BY PAYMENT OF THE ANNUAL MEETING REGISTRATION FEE IN THE AMOUNT OF $15.00 FOR EACH LAWYER. This fee is NOT a deposit on hotel accommodations, but is used to help defray expenses for services rendered in connection with the meeting. The Board of Governors solicits your co-operation in thus facilitating the handling of the registration fee and in partially defraying the increasing expense of the Annual Meeting. In the event that it becomes necessary to cancel a hotel reservation, the registration fee will be refunded, PROVIDED NOTICE OF CANCELLATION IS RECEIVED AT CHICAGO HEADQUARTERS NOT LATER THAN JULY 31, 1959. ALL UNASSIGNED SPACE WILL BE RELEASED TO THE RESPECTIVE AVAILABLE HOTELS, BY THE ASSOCIATION, ON JULY 31, 1959, AFTER WHICH DATE RESERVATIONS MAY BE MADE BY INDIVIDUAL MEMBERS DIRECTLY WITH SUCH HOTELS.

REQUESTS FOR RESERVATIONS, TOGETHER WITH $15.00 REGISTRATION FEE FOR EACH LAWYER FOR WHOM RESERVATION IS REQUESTED, SHOULD BE ADDRESSED TO THE RESERVATION DEPARTMENT, AMERICAN BAR ASSOCIATION, 1155 EAST 60th STREET, CHICAGO 37, ILLINOIS. THOSE MEMBERS WHO PREFER TO MAKE THEIR OWN RESERVATIONS IN HOTELS OTHER THAN THOSE ABOVE LISTED MAY PAY REGISTRATION FEE IN ADVANCE, THEREBY ENTITLING THEM TO RECEIVE ALL ANNOUNCEMENTS CONCERNING THE ACTIVITIES OF THE ANNUAL MEETING. THE NAMES OF SUCH REGISTRANTS WILL APPEAR IN THE ADVANCE REGISTRATION LIST, WHICH IS AVAILABLE FOR DISTRIBUTION WHEN HEADQUARTERS OPENS FRIDAY MORNING, AUGUST 21, 1959.

Two Trips Planned Following the Annual Meeting at Miami

Upon the close of the 82d Annual Meeting to be held in the Greater Miami Beach Area, August 24-28, two outstanding post-meeting tours will be available to all members, their families and friends.

The longer trip is a twenty-one day first-class air cruise around South America. The shorter trip is a Caribbean island-hopping flight to several of the better resort islands.

The South American Air Cruise will circle the continent counter clockwise with the first visit at Panama and continuing along the west coast as far south as Santiago and then northward following the eastern coastline. This leisurely flight will stop at the capital cities of Peru, Chile, Argentina, Uruguay, Brazil and Venezuela for visits of two to five days. An optional trip to Cuzco, ancient capital of the Incas—11,000 feet above sea level—may be included.

Excellent hotel accommodations are assured throughout. The geographic differences of the several countries plus those of common courtesies and local customs will make each visit a new, fresh and memorable experience. A full program of things to do and see has been spaced with leisure time to insure a restful rather than exhausting schedule.

The Caribbean island-hopping tour also combines colorful sightseeing and delightful tropical hotel living with ample time for beach pastimes, shopping and individual activity.

For further information and colorful literature descriptive of these trips write to:

W. M. Moloney
Harvey R. Mason Travel Company
64 Old Orchard, Skokie, Illinois.

Notice to Section Members

To assist in requesting hotel accommodations for the Annual Meeting in Bal Harbour/Miami Beach, listed below are the hotels to be used by the Sections of the Association and the dates of their council and general meetings:

Administrative Law	The Balmoral	August 22 and 25, 1959
Antitrust Law	The Carillon	August 24 and 25, 1959
Bar Activities	Americana	August 22 – 24, 1959
Corporation, Banking and Business Law	The Balmoral	August 21 – 25, 1959
Criminal Law	Bal Harbour	August 24 – 26, 1959
Family Law	The Ivanhoe	August 23 – 25, 1959
Insurance, Negligence and Compensation Law	The Deauville	August 23 – 27, 1959
International and Comparative Law	The Deauville	August 23 – 25, 1959
Judicial Administration	Americana	August 23 – 27, 1959
Junior Bar Conference	The Fontainebleau	August 21 – 25, 1959
Labor Relations Law	The Kenilworth	August 22 and 25, 1959
Legal Education and Admissions to the Bar	The Balmoral	August 21 and 25, 1959
Mineral and Natural Resources Law	Singapore	August 23 and 26, 1959
Municipal Law	Beau Rivage	August 23 – 25, 1959
Patent, Trademark and Copyright Law	The Carillon	August 22 – 28, 1959
Public Utility Law	The Ivanhoe	August 23 and 26, 1959
Real Property, Probate and Trust Law	Americana	August 22 and 26, 1959
Taxation	Americana	August 20 – 25, 1959

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICES

1155 East 60th Street.....Chicago 37, Ill.

Law and Outer Space

The recent advances in space are almost as difficult to comprehend as the infinite. The people of the fifteenth century had somewhat the same problem after the voyages of Columbus changed the then prevailing concept of a flat world with limited dimensions to that of a round world. Were it possible for a modern rocket traveling 16,000 miles an hour to follow the curve of the earth, it could circumnavigate the globe in less than two hours. We have ceased to think in terms of distance and now relate matters to time only—so many hours to Europe; so many hours to the moon.

For lack of an adequate conception of the problems involved, earth-bound man applied earth-bound legal principles to the first aeronautical laws. Progress in aviation outstripped these concepts and fashioned realistic statutes and decisions. Now we are faced with the need for space law; a need as hard to grasp as space itself. The article in this issue on space law in layman's language explains clearly and convincingly advocates the regulation of the use of space. Perhaps, as the author suggests, interest in space and space law will lessen earthly strife just as the discoveries of Columbus resolved many of the troubles of the little world of his day. The rule of law is an ideal; the rule of space by law is another ideal, not foreseeably attainable but as the article argues, well worth reaching for. Where there is no vision the people perish.

The Conference of Chief Justices

The tenth anniversary of the founding of the Conference of Chief Justices finds this offspring of the American Bar Association's Section of Judicial Administration in the full vigor of youth.

The report of its work given by its Chairman, Chief Justice Dethmers of Michigan, on page 47 of this issue of the JOURNAL, shows an impressive record of both effort and accomplishment. The work of the Conference on the techniques of the administration of justice has brought about marked progress in the handling of the business of courts, reduction of congested dockets, adoption of new rules of practice and the establishment of judicial conferences or councils in many of the states.

But over and above these practical measures, the Conference of Chief Justices has turned its attention to broader philosophical questions, particularly to the vast and difficult problem of federal-state relationships as affected by judicial decisions.

The approach made by the Conference to this problem, as Chief Justice Dethmers shows, has been marked by serious study, calm deliberation and a statesmanlike attitude throughout.

One could wish that all members of the Bar, in discussing the question of state and federal jurisdiction as affected by judicial decisions, might adopt a similar attitude of careful study, calm deliberation and temperate statement. Such a statesmanlike approach is to be expected of the Bar no less than of the judiciary.

Editor to Readers

We believe that readers of the JOURNAL *will be interested in the following written by Richard B. Allen, of Springfield, Illinois, Counsel of the Illinois State Bar Association and Assistant to the Editor-in-Charge of our department, "What's New in the Law":*

In May of 1930, Albert J. Harno, the relatively new and youthful dean of the College of Law of the University of Illinois, dispatched a "letter" to the school's alumni. This continued annually until 1957 when Dean Harno, still jaunty though laden with the highest honors the organized Bar of his state could bestow and regarded as an educational patriarch by the hundreds of lawyers he called his "boys", laid down his mantle in retirement and hied to California, where, for all we know, he may chalk up another thirty-five-year teaching career in a salubrious institution that regards age as simply a method to measure time.

The word "letter" is used with quotation marks pur-

posely. Dean Harno did not write chit-chat and social pleasantries to his alumni. He poured out his thoughts, reflections and meditations. He shared with them his concern about legal education and his desire that lawyers rise to the challenge of inexorably changing times. These are in fact a group of short essays; they are letters only in the sense that they communicate thoughts from one person to another. The letters have been collected and were printed in a limited edition for the Illinois law alumni through the generosity of the Burdette Smith Company, of Chicago.

Three facets of the Harno character that distinguished his career in Illinois clearly emerge from the letters. The first is his insistence that the educational arm of the profession be articulated with the practicing arm. He conceived the primary purpose of a law-school education to be the training of a practicing lawyer, one who would assume a place as a community leader and contribute his time and talents to the organizations of the profession. He and his faculty led the way; he served as President of the Illinois State Bar Association and contributed without stint to other groups.

The Dean's concern with the present status and future course of legal education is apparent from beginning to end of the letters. He criticized the case method for developing narrowness and parochialism. In 1937 he wrote that the case method "does not tend to inculcate broad conceptions or to engender in the mind of the lawyer a sense of perspective so that he may view the place and function of the law in the social structure". This was a tentative suggestion of the dean's grand design for lawyers—a concept which he expressed clearly in 1944 in the crucial days of World War II: "What our country now requires above all else is leaders of broad outlook and comprehensive points of view—men who are capable of making use of the fragments of knowledge possessed by the specialists and who can co-ordinate these fragments and weld them into a working whole. I envisage that assignment for the lawyers." The fulfillment of this immense function by the law schools will require legal educators whose thoughts do not pace in closed rooms. Dean Harno was one of these.

Finally, the exuberant—optimistic, if you will—vision and attitude of Dean Harno sparkle through the letters. He refused to be bound by anything but the truth. Tradition without purpose he dismissed. He looked ahead to the next step. Noting the changing times, he remarked in 1937 that "constitutional law has become a course in current events", and in 1938 he told lawyers that their traditions had hidebound them, causing a rise in unauthorized practice and nurturing a demand for administrative tribunals. "By what token", he asked in 1940, "can we assume that the judge on whose decision we rely understood the significance and the implications of the problem before him and that he solved it wisely?"

In the latter days of his tenure his vision turned to preoccupation with the establishment of a law center, for which he knew he must have a new building. He failed to get it from the 1949 legislature and in 1951 a bill providing the funds was vetoed. In 1953, given the green-light by the University's president to go to the legislature independently, the Dean got his building. Perhaps characteristic of the person who dreamed about it most, it stands on the site of a former ROTC stable—a modern, functional structure on a campus predominated by Georgian architecture.

Nominating Petitions

Tennessee

The undersigned hereby nominate Edward W. Kuhn, of Memphis, for the office of State Delegate for and from Tennessee to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

A. Fred Rebmann III, of Chattanooga;

Lon P. MacFarland, of Columbia;

Lloyd S. Adams, Sr., and James D. Senter, of Humboldt;

Alfred W. Taylor, of Johnson City;

Erby L. Jenkins, E. Bruce Foster, John H. Doughty, Taylor H. Cox, Frank Montgomery and W. W. Kennerly, of Knoxville;

John S. Montedonico, S. Shepherd Tate, Charles G. Morgan, Richard H. Allen, Walter P. Armstrong, Jr., W. Percy McDonald, Jr., Robert M. Nelson, Ernest Williams and Walter Chandler, of Memphis;

Weldon B. White, Harry Phillips, Robert C. Taylor, William J. Harbison and Charles C. Trabue, of Nashville.

Virginia

The undersigned hereby nominate Lewis F. Powell, Jr., of Richmond, for the office of State Delegate for and from Virginia, to be elected in 1959 for a three-year term beginning at the adjournment of the 1959 Annual Meeting:

William A. Stuart, of Abingdon;

B. Drummond Ayres, of Accomac;

Armistead L. Boothe and James M. Thomson, of Alexandria;

Thomas W. Phillips and James H. Simmonds, of Arlington;

Waldo G. Miles, of Bristol;

F. D. G. Ribble, of Charlottesville;

Frank Talbott, Jr., of Danville;

Clayton E. Williams, of Lexington;

William Rosenberger, Jr., and Edward S. Graves, of Lynchburg;

Edward L. Breeden, Jr., Joseph L. Kelly, Jr., and James A. Howard, of Norfolk;

Fred B. Greear, of Norton;

Howard C. Gilmer, Jr., of Pulaski;

A. Scott Anderson, David J. Mays and Melvin Wallinger, of Richmond;

Frank W. Rogers, Richard T. Edwards and Martin P. Burks, of Roanoke;

George M. Cochran, of Staunton;

Stuart B. Campbell, of Wytheville.

Reaching for the Stars:

Space Law and the New Fourth Dimension

by Kenneth B. Keating • *United States Senator from New York*

Senator Keating feels that there is no time to be lost in making the beginnings of a code to lay down legal "ground rules" for man's use of outer space. He does not anticipate any easy task—the important thing, he argues, is to make a beginning that may eventually crystallize into an effective law of space. The article is taken from an address delivered last August before the ninth Annual Congress of the International Astronautical Federation, meeting at The Hague.

A striking parallel may be drawn between the physical world in which we move and the philosophical world which guides our affairs.

In each of these worlds we have encountered a new dimension.

In our physical world we stand on the brink of space, looking down the long corridors of time to an unending region where there is no east or west, no up or down, no weight, no wind, no sound. We are about to cast off into this mysterious "space-time continuum"[1] both to satisfy our curiosity and to enhance our position on earth.

Taking the long view it may well be, as one of America's foremost scientists asserts, that man at present is merely creating a new "chink" in his atmospheric curtain through which to extend his meager knowledge of the universe.[2] Nevertheless, this tentative beginning, this new physical dimension being opened by missile and satellite technology has created urgent new social problems on our immediate planet—problems which should also make us aware of the rapid materialization of a new *philosophic* dimension.

For lack of a better word, we might call that dimension "tempo".

Tempo connotes relative rates of speed or movement, the distinguishing characteristics of motion, or (more pertinently here) the rhythm of events. And this is precisely the new dimension which our twentieth century civilization must take into account if it is to progress, or even survive. The accelerating momentum of history, the figurative shrinking of the globe, the telescoping of time—these things now form a major component which must be included in any human equation designed to solve the social conflicts of the future.

I

Historically, civilized man has progressed along the planes of three philosophic dimensions: his power, his knowledge, his conscience. Each of these has interlaced the others.

What men and nations have done, where they have gone, how they have conducted themselves and what they have accomplished has been determined essentially in accordance with these basic dimensions.

Power has implied the ability to do and to control, the wealth and resources necessary to this end, plus the requisite physical energy and disposition to act. Knowledge has meant the know-how, the understanding, and the application of truth or logic to given situations. Conscience has displayed itself in ethics and morals, in religious development, and in rules of law conceived from Hammurabi to Holmes.

All human experience points to the fact that conscience—that is, law—is the element most needed to provide an atmosphere favorable to the march of progress. Without it, unbridled power will produce misery; and knowledge will be perverted to aid and abet in that production.

Yet conscience, or law, has traditionally followed the fact. It has always trailed its own need.

In the past this has been relatively unimportant, or at least not critical. Now, due to the evolution of the fourth dimension of our age—tempo—the lag between law and its need is becoming crucial. It is becoming a dangerous thing to tolerate. In these days of the long-range guided missile, the fast nuclear submarine, the hydrogen bomb and the instrumented satellite, it is foolhardy for nations to operate any time, anywhere in a state of anarchy.

Yet this is just what is happening

1. See Barnett, Lincoln, THE UNIVERSE AND DOCTOR EINSTEIN (Rev. Ed.) New American Library, 1952.
2. Whipple, Dr. Fred L., *The Coming Exploration in Space*, SATURDAY EVENING POST, August 16, 1958, page 33.

in space, which may thus become a fertile region for the growth of international misunderstanding or conflict.

In my judgment, we have reached a turning point in civilization—that is, the means to push out into space—where law can no longer afford to lag behind scientific achievement, but must stay abreast of it or even anticipate it.

Many competent lawyers and officials appear to doubt the urgency in connection with any beginning code for outer space.

Oscar Schachter, director of the United Nations Legal Division, has observed that "from the point of view of the international lawyer . . . international [scientific] cooperation must precede the development of specific rules of law".[3]

Loftus Becker, Legal Adviser to the U. S. Department of State, and Admiral Chester Ward, Judge Advocate General of the Navy, both eminent spokesmen for the American Government, clearly prefer a general maintenance of the status quo during the foreseeable future. Mr. Becker indicated in testimony to Congress that he felt existing doctrines were adequate to handle most space problems at present.[4] Admiral Ward takes the seemingly tenable position that we do not yet have enough information about space to regulate man's activities in it.[5]

Other legal scholars assume extended views along the same line.

Professor Leon Lipson of Yale University and Professor Nicholas D. Katzenbach of the University of Chicago suggest that the absence of any law of outer space is, for the time being, a healthy condition—one which will gradually change, bit by bit, as conflicting interests arise and are properly weighed in the balance.[6]

Influential attitudes such as these must not be ignored. But they are far from being unanimous. Other prominent lawyers are in disagreement with them.

For example, John Cobb Cooper, the distinguished authority on international air law, and Andrew G. Haley, general counsel for the American Rocket Society, both are on record as favoring a prompt effort to iron out legal problems presented by space exploration.[7]

The celebrated rocket expert Wernher von Braun senses the current science-law dilemma when he observes:

> One of the most crucial problems of our times lies in the fact that the very nature of technology is dynamic, while the forms of political law and order which mankind needs for a peaceful co-existence are fundamentally static.[8]

This general concept, as noted, may have been true in the past. It may be true now. But it *can* change—and should.

In fact, I foresee a time when the dynamic development of rules of law may in some instances shape the trends of technology—an idea recently touched upon, at least implicitly, by the former President of the American Bar Association, Charles S. Rhyne:

> The new frontiers in the conquest of space are exceeded only by the problems in human relationships which flow from our physically indivisible world. Here too the law offers our best hope. The lawyer has always been the technician in man's relationship to man. . . Perhaps joint effort on law for peaceful control of outer space can pave the path to legal machinery to insure peace on planet earth.[9]

Put another way, effective adherence to a code of behavior in space conceivably could shift subsequent technological emphasis *away* from war-like efforts in the scientific field.

II

To my mind, much of the confusion surrounding the need or possibility of a code for outer space stems from:

(1) A too-anxious desire to resolve at once the thorniest legal question-mark conjured up by our prototype activities in space—that is, the question of fixing a limit on the upward extent of national sovereignty.

(2) An unnecessary and undesirable blending of civil and military problems.

Both these factors are closely tied in with national security—in short, with the tremendously complex matter of disarmament. The driving force behind the desire to limit national sovereignty into space, as well as proposals to bar space from military use, is the same force which has led the nations of earth into long unfruitful efforts to reach agreement on disarmament.

It is, basically, a noble force. And if it has thus far been a totally frustrated one, that is no reason to ignore its existence in the future, particularly where outer space is concerned.

The appearance in our time of that fourth philosophic dimension—tempo—makes it imperative that we keep on trying to obtain some dependable agreement on securing space for peaceful use. According to broad samplings of opinion, a big majority of the free world's people feels this way.[10] I have myself introduced measures in the House of Representatives to put Congress on record as favoring such an agreement[11] as have other members of Congress.

But we must face facts, and the facts are that securing any such ban on a *dependable* basis is fraught with many of the same difficulties which attend disarmament. In other words, the prospects for getting more than some vague and pious general statement, on an international level, are obviously dim.

Until they brighten—what?

Do we stand by and observe? Do we wait for conflict to appear and then seek to overcome it piecemeal? If so, do we attempt this by individual persuasion, through bilateral negotiation, or via regional cliques?

I think not.

World civilization has passed the point—again due to a rising tempo in human affairs—where it can afford to sashay into space without some anticipation of the consequences or permit

3. Proceedings of the American Society of International Law, 1956, page 106.

4. Hearings before the Select Committee on Astronautics and Space Exploration, 85th Congress, on H. R. 11881, pages 1269-75.

5. J.A.G. Journal, March, 1957, pages 3-8.

6. Symposium—"The Law of Outer Space"—Ohio State University, April 12, 1958.

7. Cooper, address at regional meeting of American Bar Association, February 22, 1958. Haley, testimony before the House Committee on Astronautics and Space Exploration, 85th Congress, on H. R. 11881, page 1434.

8. Reported in Missiles and Rockets, June, 1957, page 75.

9. "Legal Horizons of Space Use and Exploration", address at University of South Dakota, April 19, 1958.

10. New York Herald-Tribune World Poll, July 20, 1958, discloses the following sentiment in favor of President Eisenhower's plan to bar space from war uses: Denmark—76 per cent; Sweden—76 per cent; Netherlands—66 per cent; France—65 per cent; Britain—64 per cent; Germany—61 per cent; Japan—56 per cent; Venezuela—56 per cent; Italy—54 per cent; Mexico—52 per cent. Largest anti-ban sentiment recorded was: Italy—36 per cent; Japan—36 per cent; Germany—26 per cent; France—24 per cent.

11. H. Con. Res. 265, 85th Congress, 1958.

the concept of space regulation to "just grow".

That is too risky in the Buck Rogers era we are rapidly entering.

The alternative, then, would seem to be an immediate multilateral effort to begin work on the formulation of a space code in areas where most nations might be willing to give it effect—namely, the *civil uses* of space.

Emphasis goes with both words.

Admitting that it will be no easy task, in many ways, to distinguish civil from military uses of space, I am not ready to concede that it cannot be done. It *can* be done if the problems are approached with logic and reason. Under the circumstances, it must be done. For the civil arena represents not only the best possibility for a space code, but agreements reached in this theatre may well serve as a peaceful beacon to guide nations as they probe into space—"a standard", as it were, "to which the wise and honest can repair".[12]

It is also important, for the present, to concern ourselves mainly with the *use* of space. This is quite a different thing from dominion or territorial sovereignty; and by concentrating on *activities* and *license to use* it may be possible to avoid some of the pitfalls which inevitably lurk about the conference table when territorial claims or other vested interests are involved. One need only recall the abortive Geneva Conference on the Law of the Sea last spring to perceive that danger.

By the same token, if we begin now on at least the start of a space code relative to civil uses, we may create sufficient precedent—substantively and procedurally—to prevent the evolution of vested interests or unreasonable claims in space.

We can be sure such claims will be made, both those with some color of right and those without. Doubters might ponder this statement made not too long ago by a prominent Soviet lawyer:

> Historical, political and legal facts give us a claim to full sovereignty over the Arctic seas. The international rules governing the open seas cannot be applied in the Arctic. The Arctic Seas are our national waters whose legal status must rest on unconditional recognition of the USSR's sovereignty.[13]

The exploration of space—by its very nature and by the inability of most nations to contest claims therein—presents one of those situations in which "vested interests" may be asserted almost overnight if not forestalled by prior agreement. This thought has already been suggested by Dr. C. Wilfred Jenks of the International Labor Organization:

> While it is healthy that the evolution of law should follow rather than anticipate that of life, there are circumstances in which the possibility of developing the law on sound principles depends primarily on an initiative being taken in the matter before *de facto* situations have crystallized too far.[14]

Spacewise, this contention seems peculiarly applicable today.

In any event, if we are able to reach a few important agreements on operational levels, even though they require much initial flexibility, we would be creating a new force in the world which conceivably could make itself felt in today's taut regime of international politics and perhaps contribute measurably to a lessening of world tensions.

To some extent, the International Geophysical Year may have done just this. It is a point worthy of reflection.

III

What matters might a first conference on a code for outer space profitably discuss? I have no special *expertise* in the technology of space, but a number of possibilities and needs come readily to mind.

Among them:

The filing of "flight plans" for satellites and missiles other than those intended as sounding instruments or those scheduled to be lost in space. Dr. John P. Hagen, director of the Vanguard Project, has cogently pointed out the value of notice and agreement on satellite orbits, both in order to prevent scientific confusion and to minimize the political danger of falsely identifying peaceful craft as hostile objects.[15]

Continuing agreements for exchange of technical information as to (a) performance of spacecraft, and (b) accumulation of data.

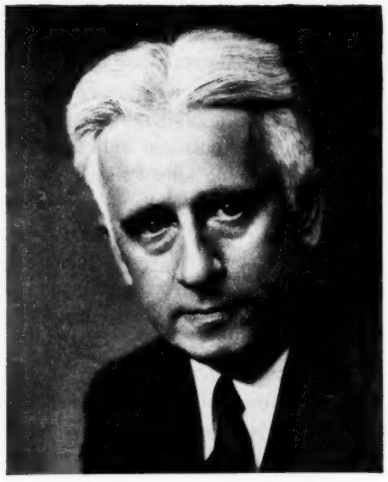
Workable schedules for spacecraft broadcasting in regard to (a) use of frequencies, (b) signal codes employed, (c) co-operative triggering of transmissions to permit more accurate reception of information.

Return-to-earth covenants in regard to (a) the surrender of craft downed on foreign soil and (b) liability for possible trespass and damage.

Navigational co-operation to facilitate fixes, tracking, telemetering, rescue and the like.

Possible agreements regarding safe passage for scientific craft—which may require some pre-launching inspection in certain cases.

Pooling of international knowledge, equipment, personnel and funds where particularly significant and costly



Kenneth B. Keating had served six terms in the House of Representatives before his election to the Senate in November. A graduate of the University of Rochester and of the Harvard Law School, he was admitted to the New York Bar in 1923, practicing for many years in Rochester. He served in both World Wars, leaving the service after World War II with the grade of brigadier general.

12. Washington, Speech to the Constitutional Convention, 1787.
13. M. Vishnepolski, 1952, reported at 41 Grotius Society 149 (Transactions for 1955).
14. *International Law and Activities in Space*, 5 International and Comparative Law Quarterly 101 (1956).
15. Note 4, *supra* page 307 *et al.*

projects are to be undertaken.

Perhaps, when and if such points as these have been woven into the fabric of a beginning space code, it will then be possible to consider seriously the question of national sovereignty into the sky—at least to the extent of formulating agreements on the "limited sovereignty" championed by some outstanding thinkers[16] or by finding a *maximum* territorial limit which nations will be willing to recognize.

In any effort along the foregoing lines, it must be kept in mind that there are differences between aeronautics and astronautics, between the earth's envelope of atmosphere and outer space.

I am well aware of influential views to the contrary. The Chief of Staff of the U. S. Air Force, General Thomas D. White, states that:

> In discussing air and space, it should be recognized that there is no division, per se, between the two. For all practical purposes air and space merge, forming a continuous and indivisible field of operation.[17]

General D. L. Putt, research and development chief of the Air Force echoes the identical thought.[18]

From the standpoint of military tactics this may be so. I am not competent to argue that question. But from the practical standpoint of developing a space code, the military view is immaterial.

In the first place, a majority of today's leading military minds seem to doubt if space itself will have much more than nominal significance, strategically, for many years to come. It is their contention that the cheapest and most effective means of waging war are likely to remain on an earth-point to earth-point basis—that is, space will be employed mainly for surveillance or simply as a medium of momentary transit for earth-to-earth vehicles or missiles.

In the second place, under the United Nations Charter all countries now have the legal right to take whatever steps are necessary to insure their defense[19]—whether on land, sea, air or, presumably, in space. Indeed, the United States and Canada have long since availed themselves of this privilege when they set up Air Defense Identification Zones and assumed jurisdiction for security purposes over large areas of the oceans bordering their coastlines.[20]

It follows that, since *all* nations claim their only interest in armed might rests with the principle of self-defense, and since legal freedom in this regard is already spelled out in the United Nations Charter, there is every reason to proceed with whatever agreements can be reached relative to the use of space without worrying overmuch about whether we shall hamstring the military.

However, the assertion that there is no difference between air space and outer space certainly does not hold scientifically, politically or legally. It is true that we are at present unable to make a precise distinction between them in any of these three languages. But we can say this:

The one element (air space) is a fixed property of earth. It is as much a part of our planet as the land and sea, and it is therefore subject not only to legal doctrines of property and equity, but to physical manipulation and control. The latter, in fact, already has been evidenced in connection with such projects as weather modification and the regulation of air pollution. The other element (outer space) is in a different category. While we may some day discover "substance" in space that will lend itself to capture and control, the most we can say now is that man's *activities* there are the only governable factors.

The contrast is considerable, physically and socially—which brings to mind a notable warning penned by Mr. Justice Frankfurter in regard to the development of air law as it may pertain to established laws of land or sea:

> One of the most treacherous tendencies in legal reasoning is the transfer of generalizations developed for one set of situations to seemingly analogues, yet essentially very different, situations.[21]

We can be reasonably sure, I think, that the aeronaut and the astronaut will one day find themselves governed by rules which are by no means identical. In short, there *are* differences between air space and outer space—differences apt to diverge even further as man probes deeper into space and comes in contact with other celestial bodies.

The tricky question, of course, and the meaty one, is: how do we go about developing a worthwhile code for space behavior?

Many scholars believe that this should evolve slowly, on an *ad hoc* basis, acording to the evolution of each individual problem or need as it attains prominence in the international community.[22] Some suggest that "the United Nations is the proper forum for necessary discussion".[23]

My own view falls somewhere between.

As indicated, it is my belief that the matter is too urgent to be left to the normal routines of social evolution. Nor do I think that the United Nations itself, which now bears a stamp of ineffectiveness in regard to disarmament and territorial waters, should be the agency to do the initial work. The United Nations could, of course, be used expeditiously at a later date in evaluating and adopting draft codes.

I suggest exploring the possibility for a specialized agency in astronautics to be brought into relationship with the United Nations according to the terms of its charter.[24]

Perhaps some existing specialized agency capable of doing the spadework already exists. But this is doubtful.

The International Civil Aviation Organization would seem to be the most nearly appropriate unit to take over the space code task. However, there is a very real likelihood that the ICAO, both by its charter and because of predisposed and specialized ways of thinking, is not the proper agency for the job.[25] Besides, it would appear that the

(*Continued on page 92*)

16. Goedhius, *The Air Sovereignty Concept*, 22 JOURNAL OF AIR LAW AND COMMERCE 209 (1955).
17. *Air and Space Are Indivisible*, AIR FORCE MAGAZINE, March, 1958, pages 40-41.
18. Note 4 *supra*, at page 103.
19. Article 51.
20. 30 CANADIAN BAR REVIEW 257 (1952).
21. *Braniff Airways* v. *Nebraska Bd.*, 347 U. S. 590; 74 S. Ct. 757 (1954).
22. See McDougal and Lipson, *Perspectives for a Law of Outer Space*, 52 AMERICAN JOURNAL OF INTERNATIONAL LAW 407 (1958).
23. Sir Leslie Munro, address before the Harvard Law School, June 11, 1958.
24. Chapters IX and X, Charter of the U. N. Organization.
25. Note 3, *supra*, pages 100-101.

Justice Department Lawyers:

The Attorney General's Honor Program

by Stephen C. Bransdorfer • *of the Michigan Bar*

In this article, Mr. Bransdorfer describes the Attorney General's Recruitment Program for Honor Law Graduates, inaugurated in 1954 under Mr. Brownell to provide high calibre material for the Department of Justice. Now in its fifth year, having enrolled more than two hundred of the top product of the nation's law schools, the Honor Program seems to be achieving the high goals that Attorney General Brownell envisioned in 1954.

During the past five years the administration of justice on a federal level has felt the impact of a program which has brought honor law graduates from thirty-six states and sixty-two universities into the Department of Justice.

The program is the Attorney General's Recruitment Program for Honor Law Graduates, instituted by former Attorney General Herbert Brownell, Jr., in 1954. In announcing its initiation, Mr. Brownell described its purpose as being two-fold. He said: (1) the Department of Justice needed the services of young topflight lawyers; and (2) the legal profession as a whole would benefit by the training and knowledge that the young attorneys would carry with them into the private practice of law if they left Government service.

The need of both the Department of Justice and the nation's Bar to have high calibre law graduates enter Government practice was clear.

First, the Department of Justice, often called the world's greatest law office, has a huge legal staff. At the end of fiscal 1958, the Department had 1,782 practicing attorneys. These attorneys are the hub around which revolves the work of the nearly 31,000 Department of Justice employees charged with the administration of federal law. In a law office of such proportions, personnel matters—particularly those involving the securing of outstanding new attorneys—are of key importance.

On the other hand, the continued growth in importance of knowledge about Government litigation indicated that the Bench and Bar of the nation, as well as the public, would greatly benefit from the experience new lawyers would gain through Government practice.

This picture has not changed. The 1957 annual report of the Administrative Office of the United States Courts indicated that approximately one of every two cases filed in the U. S. District Courts in fiscal 1957 involved the United States as a party[1] and that a slightly higher ratio of the appellate cases in the United States Courts of Appeals involved the Government as a party or were appeals from federal administrative agency determinations.[2] These cases did not include the more than 2,400 actions brought in the U. S. Court of Claims against the United States based on Government contracts, tax refund claims, federal employee matters, Government requisitioning of property and other federal activities.[3]

The Justice Department . . . "Vague and Mysterious"

Despite this vast amount of legal work involving the Government, Mr. Brownell in the speech which announced the Recruitment Program pointed out, "There is something vague and mysterious about the work of the Department of Justice to those who have never been associated with it."

The Recruitment Program was launched with thirty positions being made available for 1954. An office to administer the Program was established in the Office of the then Deputy Attorney General, now Attorney General, William P. Rogers. The present Deputy Attorney General, Lawrence E. Walsh, is now responsible for its overall administration. A pattern of action was established with the first year's group that has been generally followed with later groups.

First, standards were established

1. Annual Report of the Director of the Administrative Office of the United States Courts, 1957; Table C 1, page 170; Table D 1, page 207.
2. *Id.* at 160, Table B 1.
3. *Id.* at 260, Table G 3.

which were felt should be the yardsticks of achievement for those to be asked into the Honor Program. Politics has been no consideration.

The merit qualifications include experience prior to law school, courses and grades in law school, and extra curricular activities in such things as law review, moot court and legal aid. No regional quota system was or has been applied.

Next, to insure that graduates of all the nation's accredited law schools were aware of the opportunities in the Department of Justice, application forms were distributed to all these law schools. Additional publicity and strong support was given the program by the American Law Student Association of the American Bar Association. The American Law Student Association has invited Department of Justice officials to explain the program at meetings of many of its member groups and has periodically published articles about it in its magazine, *The Student Lawyer.*

Another new Department of Justice personnel recruitment feature was adopted. Instead of requiring the applicants to travel from across the country to Washington, D. C., to be interviewed, the Department came to them. Underscoring the importance of the program, Assistant Attorneys General, when possible, conducted interviews at central regional points across the country. Other interviews were conducted by United States Attorneys in the areas in which the applicants lived. All interviews were generally held in the fall with the successful applicants usually notified of their appointment after the first of the year. The new lawyers begin work any time after their graduation.

The number of applicants has grown as the program has grown. In 1954 some 300 senior law students applied. In 1955 applicants numbered 350; in 1956, 400; in 1957, more than 500; and in 1958 more than 600 students applied.

Of these applicants, approximately one in ten was invited to come into the Department of Justice. In 1954, twenty-nine honor students entered; in 1955 the total was thirty-eight; in 1956 it was forty-four; and in 1957 it grew to sixty-six. Of these 177 young lawyers, 90 per cent were in the top 15 per cent of their class with approximately 65 per cent being in the top 10 per cent. About one in ten was the number one man in his class.

The legal activity background of the group is another index of its potential. In the 1954 group of twenty-nine recruits, sixteen attorneys were members or contributors to law reviews and five were editors. Eight were members of Phi Beta Kappa. One was a teaching fellow in law school and five held scholarships. Seven won moot court awards and three won debate honors. Ten were honored with special prizes upon graduating from law school. This type of new lawyer has been the pattern with the program.

A total of fifty-six additional attorneys have entered the program since their 1958 graduations. Again, the same general scholastic and activity record has carried forward.

Referring solely to "men" is not fully accurate in describing the Honor Program members. Including the 1958 group, fourteen outstanding new women attorneys have entered the Department. Two of these were number one in their classes.

Physical Handicaps . . . No Hurdle

Another interesting sidelight about the program is the fact that physical handicaps have been no hurdle for honor graduates if they met the Department's general and academic qualifications. Two blind attorneys and six other new members with physical handicaps—including two restricted to wheel chairs—were among those who have come into the program.

Starting salary for honor graduates recruited for the 1959 Program will be $5,985. This is an increase of about $1,000 in the beginning salary offered through 1958. Department officials pointed out the salary increase will have two effects: (1) it will keep the salary feature of the program competitive with salaries offered to top graduates by firms in the nation's large cities; and (2) the calibre of achievement of those invited into the program will become even higher since eligibility will be generally restricted to the top 10 per cent of each graduating class. The Department will follow a policy of promoting the 1959 recruits to $7,030 after a year of satisfactory service. Those in the program through 1958 were also given a $1,000 raise after their first year.

The new attorneys have a voice in their placement within most of the Department's ten operational legal divisions. These divisions are: Antitrust; Civil; Lands; Criminal; Civil Rights; Internal Security; Tax; Office of Alien Property; Office of Legal Counsel; and Office of the Solicitor General. According to Philip Modlin, Honor Program Director, every effort is made to place the new attorney in the division he selects. If this cannot be done initially, transfer is later arranged as a desired vacancy arises.

Rotation within the Department of Justice is also possible. After a year's service in the initial assignment, the recruit can request transfer to another division in order to broaden his Government legal experience. These rotations are made as vacancies arise within the various divisions.

Early in their careers at the Justice Department the new attorneys are given a comprehensive orientation course to acquaint them with the over-all operations of the Department. Another activity, organized by the program members themselves, is a series of periodic luncheon meetings of the group during which outstanding attorneys, both in and out of the Government, informally meet and talk with the group.

The type of work of each new lawyer depends upon his assignment. It may be in litigation. It may be in appellate practice. It may be in assisting in grand jury presentations — or even in probate practice if the assignment is with the Office of Alien Property.

One thing is clear in the opinion of the Honor Program members. They get responsibility, and they get it early. This fact stands out in the reports about the program made to the Honor Program Director by Honor Program members. Here are some examples.

A Columbia University graduate

who was assigned to the Appellate Section of the Civil Division said:

> After two or three weeks of basic indoctrination, my work has been almost exclusively concerned with matters before the Supreme Court. The most significant and striking factor of my experience here is therefore, the fact that I have been given such serious and responsible work to do on such short experience. Without doubt, this is the most attractive feature of work in the Justice Department and under the Honor Program. I assume that this is not simply an eccentric feature of my assignment to an Appellate Section and that as time passes and my experience increases, assignments will continue to constitute a greater challenge than commensurate work in private practice.

One of the women honor attorneys, a graduate of the University of California and assigned to the Appellate Section of the Tax Division, reported:

> I can only conclude by saying that I feel my year in the Tax Division has provided me with an experience in tax matters that could not be achieved in private practice in several times that period.

The opportunity for trial experience has been a popular factor with some of the program members. A Syracuse University graduate, who was assigned to a trial unit, the Court of Claims Section of the Civil Division, stated:

> Eleven months after coming to work, I tried my first case. Nobody from the section held my hand or even showed up at the trial. It was assumed that I knew how to try a case—or would quickly learn. Since that time, I have settled myself out of an interesting trial in a construction contract case and have handled the Government's witnesses on trial in a suit for $656,000 against the United States by the State of Oklahoma. I have also acted as co-counsel on cases involving well over $1,000,000 in damages and co-authored a brief in a case in which the plaintiff is seeking $16,000,000.

A University of Chicago graduate, located in the General Crimes Section of the Criminal Division, summarized his experience by saying:

> . . . I have been given responsibilities of a more significant type than I anticipated, but I hasten to add that this was a pleasant surprise. On the other hand, I do not feel that I have been rushed into responsibilities for which I am not qualified. . . There is a satisfaction in the knowledge that one is not sweating over someone else's case.

As earlier indicated, one goal of the Program was to benefit the legal profession as a whole by the training and knowledge the young lawyers would carry back to private practice. A significant question after more than four years of program operation is: how many of the lawyers have gone into private practice?

Of the 177 recruits appointed since 1954, not including the 1958 group, 107 remained with the Department in Washington, D. C., and seventy had left as of June 1, 1958. The total still with the Department included 25 per cent of the original 1954 group. A breakdown of the total of those no longer with the Justice Department in Washington, D. C., indicates thirty-five entered private practice, fourteen entered other Government agencies, thirteen went into the Armed Forces, one became a law professor, three became clerks to judges, and four became Assistant United States Attorneys.

Officials at the Department of Justice, who have watched the program grow, feel that its impact on the nation's Bar and the public cannot be measured in statistics. They point to long-range benefits in the form of a more effective corps of federal lawyers and a more informed body of private practitioners.

However, the program has had some immediate effects. One involves the legal talent recruitment policies of other federal agencies. At least two agencies, the Internal Revenue Service and the Federal Trade Commission, have adopted recruitment programs for honor law graduates patterned after the Attorney General's program.

The Hoover Commission in its "Legal Services and Procedure" report of 1955 commended the Department of Justice's Honor Recruitment Program and recommended that it be extended to all federal departments and agencies.[4]

Another mark of recognition was given the program in 1957 when the Federal Bar Association awarded a certificate of merit to Attorney General Brownell for his establishment of the program.

Attorney General William P. Rogers has been closely associated with the program from its beginning. As Deputy Attorney General he was responsible for its over-all operations. As Attorney General he has continued to promote it. In assessing the future of the Program, Mr. Rogers said:

> The caliber of performance of those brought into the Department of Justice through the Honor Recruitment Program indicates that it has established itself as a permanent part of the Department.
>
> The fact that these young lawyers

Stephen C. Bransdorfer is an assistant to the Director of Public Information in the Office of the Attorney General, U. S. Department of Justice. He entered the Department of Justice as a trial attorney as a member of the 1956 Attorney General's Recruitment Program for Honor Law Graduates. He received a B.A. degree from Michigan State University in 1951, a Juris Doctor degree from the University of Michigan Law School in 1956 and a Master of Laws degree from Georgetown University Graduate Law Center in 1958. He is a member of the Michigan and District of Columbia Bars.

4. See LEGAL SERVICES AND PROCEDURE, Report to Congress by the Commission on Organization of the Executive Branch of the Government, Part III, page 18 (1955). The Report recommended that an Office of Legal Services and Procedure be established within the Department of Justice, with the responsibility, among other things, of recruiting all federal legal personnel.

have come from sixty-two universities from every section of the country is one of the most dramatic aspects of the Program. It means that the administration of federal justice is achieving a truly national approach—gained from the interweaving of legal viewpoints of top students from all parts of the country. On the other hand, the nation's bar, and the public it serves, will get back in private practice as some of these lawyers leave Government, attorneys trained in the problems and responsibilities of the National Government. It is an exchange of great value to our legal system.

Dean Erwin Griswold, of the Harvard Law School, summarized his views of the Program as a legal educator, when he addressed the 1957 Honor Program group at welcoming ceremonies in Washington. He told the new attorneys:

> This is a vast and complicated nation. This Department represents all the people of the land, and you who are in this Honor Recruitment Program come from 37 different law schools and from about as many different states. You are a cross section of America's able young lawyers. You have already undertaken great responsibilities. You will learn much here, and you will make great contributions, too, I know. Here you will learn not only law and practice but also attitudes of fairness and public service which will stay with you throughout your lives. I congratulate, too, the Attorney General and the Department for having planned a program of this sort, and the people of the United States for having obtained the services of so fine a group of young men. . .

The Profession Abroad:

A Glance at Japanese Legal Education

by James J. Cavanaugh • *of the District of Columbia Bar*

Legal education in Japan is much different from the preparation American lawyers receive in our law schools—the emphasis being upon the practical. Mr. Cavanaugh's article brings out some other interesting comparisons—for example, there are only a thousand judges to administer the courts for a nation of 70,000,000, and the entire practicing Bar in Japan is smaller than the Bar of an American city of 1,500,000.

Not far from the Jesuit Sophia University of Tokyo Yotsuya suburb is the one institution in Japan comparable to America's some 160 law schools. In an inconspicuous frame building on a side street, the Judicial Research and Training Institute each year graduates about 250 students. This is an unbelievably small number compared to the American total of about 8,000. And yet Judge Jiro Matsuda, head of the Institute, when asked if this was not an insufficient number, replied that perhaps it was, that the figure should be closer to 350.[1]

This small figure may be accounted for in part by the relatively small amount of legal business transacted, despite the fact that Japanese court dockets are as crowded as ours. Certainly the rate of passes on the "bar examination" would be increased if the demand for lawyers warranted it. This "bar examination", perhaps wisely, comes at the beginning of the student's professional training and determines who shall be admitted to the Institute. Out of 6,000 applicants each year for admission to the Institute, at the most, 300 pass.

Following the pattern of European universities, the academic work in law is done at the universities, the student devoting the last two years of his regular four-year college course to this subject.[2] He then takes the nationally administered bar examination if he wishes to become a practitioner.

This examination, which eliminates so many, is composed of two parts, one written and one oral. The written examination comes first and is taken over a four-day period in August. The subjects, prescribed by law, are constitutional law, civil law, commercial law, criminal law, civil procedure, criminal procedure, and one elective (administrative law, bankruptcy, labor law, conflict of laws, criminology). The results of this examination are made known in October and determine the students eligible to take the oral examination. Most applicants have been eliminated at this point. The orals, given in October, cover the same subject matter but require six days to complete. The results of this examination are known immediately and the successful students enter the Institute the following April.

The Institute puts each student through a two-year apprenticeship of which only eight months are actually spent at the Institute. After an initial four months there, the student serves four-month clerkships in a civil court, a criminal court, a procurator's office and a law office. He completes his training with a final four months at the Institute. This is a training obviously fitted only for those already admitted to the profession and calculated to make them technically competent. It stands in rather striking contrast to our attempt to continue and complete a liberal education, not infrequently at the expense of professional capacity. It is an efficiency we may be forced one day to adopt.

Judge Matsuda, who visited a number of law schools in the United States in 1955, finds our system impressive, however; not from the point of view of efficiency but from the point of view of breadth:

> ... in Japan only one and a half or two years are given to liberal arts out of the four years of college education.

1. The author was in Japan in the summer of 1956 and had an opportunity to visit the Institute and to talk with Judge Matsuda. Several advanced students were also kind enough to talk with the author and to supply much of the information in this article. Translations where necessary were done by Miss Midori Yamanouchi.

2. This would seem to be a variation from earlier practice. Witness a comment on Japanese legal education in 1927: "The Law College of the Imperial University of Tokyo especially has, by competitive examination, to reject nearly a half of the applicants, who are almost all of them *graduates from the national colleges (koto-gakko)*. . . ." [Italics added] Takavanagi. *Legal Education in Japan*, 6 AM. LAW SCHOOL REV. 161, 164 (1927).

James J. Cavanaugh is a graduate of the University of Detroit and the Harvard Law School. A member of the District of Columbia Bar, he served in the Army in Korea. He was Assistant to the Dean of the Notre Dame Law School from 1955 to 1956, and since then has been teaching business law at Michigan State University.

[The final two are devoted to jurisprudence.] This represents a great difference between the Japanese and American systems. Unfortunately, the lack of general basic knowledge among the Shiho Kenkyo Sho students is discussed often.[3]

This lament has a familiar ring, for even after four years of liberal education our law students are often thought ill-prepared for professional training. The cultural cure comes, it would seem, when three years of broad legal training are added to it.

As might be expected, the case method is ignored for the most part in Japanese university law departments and the lecture method is almost exclusively employed. More than one American observer has commented on the passivity of the students. While there has been some discussion of the case method, it has few adherents.[4] Since Japan, in spite of American influence, still has basically a civil law system, it is probably felt the case method is inappropriate.[5] The Judicial Research and Training Institute has adopted a form of the case method, however:

> . . . at the first and the last term the Institute uses printed records of actual cases. With the materials instructors and the law intern students learn principally by a form of discussion. This is different from case books in that all the documents regarding a legal proceeding are compiled. . . These teaching materials used here in Japan are just as effective as case books, if not more effective. I personally wish that law faculties of Japanese universities would, if time permits, use this type of material for study.[6]

The moot court, which Judge Matsuda found ubiquitous in his visits to American law schools, does not exist anywhere in Japanese legal education. It is not there, however, for very good reasons. It forms no part of the university education, which is avowedly academic, and it is not needed at the Institute where most of the training consists of an apprenticeship in actual court proceedings. This difference draws forth an interesting comment from Judge Matsuda:

> American law school students do not get practical training at courts, the public procurator's office, and lawyers' offices that Japanese Institute students do. Law schools are responsible for their students' learning all these things within the law schools. Therefore the moot courts are necessary things for carrying practical training to the students. . . When I visited Harvard Law School, the final argument of this year was going on. . . However, it was a sort of ceremony; at almost no time do the students of American law schools receive a direct guidance from judges. Whatever the students do in moot court is always "imitation." Therefore, as is pointed out, a gap exists between the law schools' training and actual practice. . . From what I have seen anyway, the only law school which uses a system like medical internships is Southern Methodist University Law School in Texas. . . This law school makes twelve weeks out of the summer vacation the period of internship. . . This method is the only method close to the practical training program carried at Japanese Shiho Kenkyo Sho. Thus, in general, the system in Shiho Kenkyo Sho in its practical training is not inferior to that of American law schools.[7]

Until after World War II, when the Institute was founded, few formal requirements for practicing law existed. Some practical training was expected, but no educational standards were set. Even now, admission to the Institute can be gained without university training, the only requirement being that the candidate successfully pass all the examinations in law and in addition pass several other examinations designed to test his general knowledge. As a practical matter, most prospective Institute students matriculate with one of the university law faculties. These prospective lawyers, however, constitute only a small percentage of the students enrolled in a legal curriculum. The overwhelming majority of such students are destined to become a part of the national bureaucracy. And even among the students who succeed in getting to the Institute, the goal is the judiciary. The training is heavily weighted to this end, and the Institute's head remarks that only the poorest students, who are unable to obtain some judicial appointment, practice law. This wary evasion of the whole art of advocacy rests, perhaps, on the reputation of the advocate.[8] Japanese history is almost completely unkind to the legal pleader, to the extent that he can be

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3. Matsuda, AMERICA YORI KAERITE: SONO HOGAKU-KYOIKU NO ICHIBETSU 6 (1955). This is a reprint of an article to be found originally in 16 SHIHO KENKYO SHO HO (1955). The title translates as: "Returning from the United States: A Glance at Its Legal Education".

4. Acquaintance with the case method extends over most of this century, so that it is not simply a question of its being too new to have caught on yet. Anglo-American law has been taught in the Imperial University of Tokyo since 1874 and Scott's *Cases on Trust* was being used in 1927. See Takayanagi, *op. cit.*

5. However, this inappropriateness is questionable: ". . . in 1914 judicial decisions which had regularly been reported came to play a big part, not only in the interpretation of the codes themselves, but in judicial law-making as well. Thus the law of water rights, the legal status of informal wife (common-law wife), the law of mortgage in the Anglo-American sense, etc., were really created by the decisions of the courts." Takayanagi, *op. cit.*, page 165.

6. Matsuda, *op. cit.*, pages 19-20.

7. *Id.*, pages 29-30.

8. "There is an amazing lack of litigation in Japan. A single system of courts, staffed by about a thousand judges, has proved adequate in the past to serve the needs of a nation of over seventy million people, and the total bar of Japan is less than that of an American city of a million and a half population. This phenomenon can be explained as a combination of the lack of a contentious spirit, of the presence of informal pressures for settlements, of popular discouragement at the sluggishness of judicial process, of the strong tendency to compromise all disputes[77] and of Japanese practices of maintaining official records which state authoritatively many family relationships and property rights which in other countries frequently require judicial determination." Footnote 77 reads: "This same attitude toward litigation was noted by Dean Wigmore over 50 years ago, who observed in his *Introduction to Private Law in Old Japan* . . .: 'It was and to a great extent still is an ingrained principle of the Japanese social system that every dispute should, if by any means possible, be smoothed out by resort to private or public arbitration.'" Blakemore, *Postwar Developments in Japanese Law*, 1947 WIS. L. REV. 632, 648-9.

found at all in Japanese history, and it is an extraordinary Japanese citizen today who would trust his affairs to a practicing lawyer. I personally observed this attitude frequently in Japan. Most Japanese (outside the profession) find the term *bengoshi* (lawyer) a cause for huge merriment. The advocate as a popular hero, a Clarence Darrow or Edmund Burke, is unheard of.[9]

Thus while law as a subject of study is popular, its practice as a profession is not, most of its students using it as a step into civil service. In this respect Japanese legal culture is primarily an instrument of the state. And while there is nothing necessarily "bad" in this function, individual rights are probably safer in a society where legal culture is frequently the instrument of private interests.

9. But see Rabinowitz, *The Historical Development of the Japanese Bar*, 70 HARV. L. REV. 61. On page 80, footnote 33 reads: "The lawyers themselves suggest that one reason why unauthorized practice has been so common is that the lawyer's self-image has been that of an advocate who properly should remain aloof from such activities as drafting documents."

Views of Our Readers

(Continued from page 20)

Philosophy would solidly be established, if men would more carefully distinguish those things that they know from those that they *ignore.*

SAM R. FISHER

Houston, Texas

The Legal Profession Needs a Major Operation

Lee Loevinger's article in the July, 1958, issue of the A.B.A.J. (44 A.B.A.J. 615) is the latest of several recent articles and pamphlets I've read concerning lawyer's incomes. It is the first one I've read that attempts to prescribe treatment for the illness. We can all diagnose the disease when we fill out our I.R.S. Form 1040. We have, however, done little to arrest the malignancy.

Referring to Attorney Loevinger's prescription, let us add these facts. Using 4.0 as the numerical basis for an "A" standing, at least one of our Kentucky law schools requires only a 2.3, or very slightly higher than a "C" average, for admission. In 1951, Harvard Medical School frankly admitted they exhausted all the 4.0 applicants before accepting the 3.9 group! Perhaps this is some indication of the different qualifications required of applicants to law and medical schools, although it may well be the extreme case.

"Doctor" Loevinger's order on the patient's chart for a four-year *prescribed* prelaw course (one Kentucky school requires six hours of English as the only prelaw requirement); for higher standards for admission; for a four-year law school (why not have the fourth year open for electives?); and for more difficult over-all standards for aspirants is clearly good pediatric treatment. However, it appears that radical neuro-surgery is indicated, followed by neuro-psychiatry, for the adult patient.

The American Medical Association promotes a momentous educational program in getting the patient to the physician's office and in painting the "doctor" (this term so far as the M.D. is concerned should not be loosely applied to Ph.D.'s, etc.) as the successor to Caesar's wife. "Preventive law" is equally as important in its niche as "preventive medicine". When we view the TV program, "Medic", it is not difficult to see why Mrs. John Q. Public prefers to have her annual physical over urging Mr. John to drop by to get that will drawn they've talked about. When "Doctor Conrad" announces, "I am a Doctor of Medicine", Mrs. John reaches for the bedside thermometer. When "Lawyer Crook", local mouthpiece for the narcotic dealers association, steals "Widow Brown's" mineral rights while the widow is attending the late Mr. Brown's funeral, Mrs. John Q. reaches for the family gun. "Medic" *alone* has accomplished two major purposes. It lets the public look into the mysterious field of medicine and it portrays the physician in a desired light. If the public was allowed to view the mysteries of law, other than the one narrow field of criminal law, there might be more clients in our offices. Maybe even the answer, "I don't have anything to leave", to the advice that a will be drawn, could be replaced. Maybe the answer that, "We don't need the title examined because the house is in a brand new subdivision", would be abolished. Our ethical standards rightly forbid us from going to our client and telling him he ought to have legal work done. The same standard is applied to our brother physician, but the A.M.A. does this work for him, and ethically.

We can have ten-year law schools, and admit but one lawyer per year from each state to the Bar, but until the general public is acquainted with its legal needs and looks upon the attorney as an honest, ethical, professional man, we will keep our cancer. The American Bar Association has not, in my opinion, properly set the stage for the practitioner as has the American Medical Association for our brothers. Until it does, we will continue to suffer the agonizing pain our malignancy brings. The pain will eventually surpass the sedation we have received from so-called "minimum fee" schedules and other placebos. Sedation cannot cure cancer! We need *deep* therapy, and now. The bank, the C.P.A., *et al.*, *can* replace the "indispensable" lawyer. Mr. Loevinger's table showing 132 physicians per 100,000 population in 1955, as compared to 146 lawyers, patently demonstrates that there are not many more lawyers than doctors. The difference is that we are no longer addressed with a prefix "Attorney" or "Lawyer", and the public trusts and uses the services of the physician while avoiding, until the final moment, the services of the lawyer. It is my opinion that our American Bar Association needs to scrub for a major operation.

HENRY V. PENNINGTON

Danville, Kentucky

Lawyers Don't Work as Hard as Doctors

Your leading article of the July issue, Mr. Loevinger on "Why Doctors Make More Money than Lawyers", is of personal interest because my wife is an M.D. with an active practice.

In all statistical studies something is omitted. Mr. Loevinger may have had to omit a comparison of working hours because of the difficulty of obtaining data.

Speaking of a 1956 study, Mr. Loevinger states: "The median income for all lawyers was $7,833, and for doctors was $16,071." He does not say how many hours were required by the lawyers to make $7,833 or for the doctors to make $16,071. Medical economics has made a study of the doctors' hourly compensation and for general practitioners, if my recollection is accurate, it is under $4 an hour, after overhead and before taxes, in the New England area.

I see a good deal of lawyers' work in my own special field and agree with Mr. Loevinger on the need for the Bar to develop higher standards of service to the public. We need specialists in the medical sense; *i.e.*, men accredited by their professional brethren as tested for special skill who decline to accept work outside their chosen fields. We need specialists particularly in thinly populated areas where large firms are not possible.

But, pre-millenium, I console myself with the thought that my work day is at least two hours shorter than my wife's on Mondays through Fridays and at least six hours shorter on Saturdays and Sundays. My sleep is seldom interrupted. My wife's often is.

Of course, this does not put the emphasis where it belongs: better service to the public. But the thought that the doctors have to work longer hours may have some consolation for other members of the Bar.

(Name Withheld by Request)

The Client and the Lawyer's Responsibility

I have read with interest the article by Mr. Siddall in the September issue of the American Bar Association Journal entitled "The Law Firm-Client Relationship" (page 845).

It is an interesting article and very thought provoking. However, I cannot agree with the author when he attempts to defend the conduct of Mr. Allen. In my humble opinion Mr. Allen had done all that was required of him when he informed Mr. Wheeler that in his (Allen's) opinion Mr. Wheeler's case was a doubtful one and should be settled. After having received that advice it was then quite proper for Mr. Wheeler to take the position that he was not in agreement with Mr. Allen and that he preferred to try the case. From that time on it was a matter between Mr. Carr and Mr. Wheeler.

Furthermore, I think the conduct of Mr. Allen was quite improper when he permitted himself to discuss the matter of settlement at all with the attorney on the other side. In doing that, Allen was violating the express direction of his client, who also was a lawyer.

If the lawsuit in the office disturbed the conscience of Mr. Allen, then it was his duty to cause Mr. Carr to relinquish the professional relationship between the firm and Mr. Wheeler.

Ford Q. Elvidge

Seattle, Washington

A World Court and the Communists

In Mr. Rhyne's article under this title three important categories appear —people, nations and governments. Nations are made up of the other two categories, people and governments. People in civil life do not want war, hence on a majority basis, as they far outnumber people in government, no nation wants war. This leaves the category least pin-pointed for scrutiny—government — as the fountainhead of trouble and the one to deal with.

Where terror and fear are abolished in a nation the courts prevail and one is at a loss to think of any such nation as a serious threat to world peace. Law does mean reason and fairness. The opposite is true in other nations, so it is common sense, as Mr. Rhyne suggests, to discard the Soviet Union as a subscriber and adherent to a world court. Yet, Communist governments may not safely be ignored, for it is likely they will never back down from their avowed purposes by reason of outside pressure short of war. Thus a black menace remains that sanctions and such will never disturb. It seems the whole question, then, is how to change a government that is so far out of line.

Our nation was founded on guns from within to drive out oppression. Is it not possible that courts and law will come to Russia after the "good" and "bad" men of Russia fight it out? If this were not so Communists need not first confiscate all small arms before starting their reign of terror.

Our problem may well be to work with the civilian people of such nations —not their governments—in an effort in some way to help them maintain a degree of personal protection from their oppressive government, so that the free hand of totalitarian government may be tempered by formidable fear from within, and eventually superseded. This can be done by promoting through every possible channel the right of all individuals to have and maintain small arms of their own.

Each of us can determine how he stands on this question by deciding where he and his family could live under less terror and fear—in the Soviet Union, unarmed and in an unarmed community, or in a community where each one had the gun power to back up what is right and decent and law abiding.

Stanley L. Burns

Proctor, Vermont

Books for Lawyers

AN INTRODUCTION TO LAW: *Essays of general interest selected from the pages of the* Harvard Law Review. *Cambridge, Massachusetts: Harvard Law Review Association. 1957. $2.95. Pages 436.*

Without much question, the debt of the legal profession is greater to Harvard Law School than any other, and of all the law reviews in the land, the most superlative legal writing year by year consistently appears in it. It takes courage for a Cornellian to acknowledge this. For this reason, if no other, any collection of articles from its pages demands the careful consideration of anyone who presumes to review them. This is particularly true when so fine a fellow and so competent a scholar as Professor Arthur E. Sutherland, Jr., writes in such high praise of the selections in what the frontispiece calls a "Preface" and he, a "Prologue to an Introduction".

The selected articles are published under five subject headings: "Legal Philosophy", "Judges and the Courts", "Legislation", "Practice of Law" and "Selected Fields of Legal Controversy".

Of the pieces that appear in the legal philosophy section (pages 1-106) the one that thrilled me, and will you whether you read it here or in 62 *Harvard Law Review* 616, is "The Case of the Speluncean Explorers" by Professor Lon L. Fuller of Harvard Law School. In case you do not know, the Speluncean Society will, in centuries to come, explore caves in the Commonwealth of Newgarth. Five members, under the leadership of Roger Whetmore in May, 4299, were so imprisoned that to survive they drew lots and ate their leader. The four survivors are tried for murder and sentenced to be hanged. Professor Fuller reports the five opinions in the Supreme Court of Newgarth that in A.D. 4300 will affirm the convictions.

In all my days I have never read a more clever and stimulating set of opinions than those by Chief Justice Truepenny and his Associate Justices Foster, Tatting, Keen and Handy. Several times I shut my eyes and thought I was reading one of the many opinions that Justices of the United States Supreme Court write when they want to duck decision and pass the buck to the President or the Congress. Fuller's piece is so good it's worth the price of the book.

I wish I could be equally generous with respect to "The Speech of Justice" by Judge Learned Hand, "The Place of Logic in the Law" by Morris R. Cohen, and "The Path of the Law" by Mr. Justice Oliver Wendell Holmes upon which Professors Mark DeWolfe Howe and Henry M. Hart, Jr., of Harvard Law School, comment. In my judgment, these pieces, except the lucid one of Professor Hart, Jr., are as unfit for beginning law students as "work on differential calculus to a student who has yet to begin the study of mathematics".[1] Hart, Jr., says the first part of Holmes sheds "more darkness than light" and the second part does not fit. I would not know. The lights never went on in the ball park for me and I don't know where to buy a "trot".

In the second section, "Judges and the Courts" (pages 111-299) we find an article by the late Justice Benjamin Cardozo, "Law and Literature", which carries a foreword by former Dean James M. Landis of Harvard Law School, "A Trial Judge's Freedom and Responsibility" by Federal District Judge Charles E. Wyzanski, Jr., "The Business of the Supreme Court as Conducted by Chief Justice Hughes" by Edwin McElwain, "The Retirement of Federal Judges" by Professor Charles Fairman of Harvard Law School, and "Extra-Judicial Work for Judges: The Views of Chief Justice Stone" by Professor Alpheus Thomas Mason of Princeton University.

At a time when the Supreme Court of the United States is the No. 1 cocktail and dinner topic, it is refreshing to read how Charles Evans Hughes ran the business of the Court. In particular, the meticulous care with which Hughes, but lately Wall Street's highest priced barrister, sifted through petitions to appeal *in forma pauperis* makes the lawyer proud of his profession. And of course, no piece is more timely than Mason's superb account of how Chief Justice Stone deplored the acceptance by Supreme Court Justices of extracurricular duties. Distinguished professors, lawyers and legislators who made the mistake of asking the Court or one or more of its Justices to take membership on a Presidential Inability Commission can profit by reading Mason's article.

In the best anthology, some pieces do not survive the test of time. Were I the editor, of this group I would have only reprinted the pieces of McElwain and Mason. These two are really great. The others are either dated or pedestrian or both.

In the third section, "Legislation" (pages 251-307), there appear four pieces: "A Ministry of Justice" by Benjamin N. Cardozo; "Common Law and Legislation" by Roscoe Pound; "A Note on Advisory Opinions" by Felix Frankfurter; and, "A Presidential Legal Opinion" by Robert H. Jackson.

Of these only the article by Mr. Justice Cardozo in my opinion warrants republication. This article is a classic. It caused New York and other states to create Law Revision Commissions and some day we hope it will cause the nation to do the same. The other three leave a great deal to be desired. Pound has much better pieces than this and both Frankfurter and Jackson's pieces are too fragmentary. In Jackson's case to appreciate it, you should read the excellent article of Robert Ginnane to which the Jackson piece is a footnote.

The fourth section, "Practice of

1. Comment by Dean Joseph O'Meara on the recommendation by thirty-one law school deans of Holmes' *The Common Law*. See Preface by Professor Julius J. Marke in his "DEANS LIST OF RECOMMENDED READING" 1958 Oceana Press, N. Y. One dollar in paper; $3.50 hard back.

Law" (pages 311-324) has but one article, "The Public Influence of the Bar" by the late Chief Justice Harlan F. Stone. It was the speech that Stone gave on June 15, 1934, at the dedication of Michigan Law School's Law Quadrangle—the gift of Cook, the Wall Street corporate lawyer. Why *Harvard Law Review* rather than *Michigan* published it, is not explained. It is a splendid speech made as the country was emerging from the '29 depression. In it, Stone notes the changed state of the legal profession in our day from Washington's and pays great tribute to the law teaching profession for its encouragement to legal and social reforms.

The fifth and last section, "Selected Fields of Legal Controversy" (pages 327-436) contains: "New Encroachments on Individual Freedom" by John Lord O'Brian; "The Origin and Scope of the American Doctrine of Constitutional Law" by Professor James B. Thayer of Harvard Law School; "The Democratic Character of Judicial Review" by Dean Eugene V. Rostow of Yale Law School; and "Percentage Depletion—A Correspondence" between Rex G. Baker and Dean Erwin N. Griswold of Harvard Law School.

In many ways this is the best section in the book. The piece by John Lord O'Brian is excellent indeed. It is inspiring to see Mr. O'Brian in the evening of his days so gallant a fighter for individual liberty. Rostow's article, following as it does the dull piece of Thayer, is mighty interesting and stimulating. I loved it. The Baker-Griswold correspondence I also found interesting. Until I read it, I did not know what a powerful argument can be made for some sort of oil depletion income tax credit, and, though I hate to say it, in the argument, Texas Baker, the attorney for Humble Oil, seems to have the edge on Dean Griswold of Harvard Law School.

From all of which the reader can conclude that I found good things and bad things in this book. The selection definitely could have been better. Brandeis' famous article that created a right of privacy is not here. Nor are any of the beautiful pieces Felix Frankfurter wrote as a professor about Holmes. Readers can lament the absence of their favorites. In my case Harry Tweed's "Death and Taxes Are Certain—But What of Domicile?" 53 *Harvard Law Review* 68. However, the worst fault in the book is its title: "Introduction to Law". Men thirty years at the Bar will be unable to comprehend many articles in this book. It will, I am sure, never realize the hope Professor Sutherland expresses in his "Prologue" of interesting laymen in our profession. Any layman that makes the mistake of trying to read and understand the articles in this collection, with one or two exceptions, will go stark, raving mad.

This book is a collection of some very fine legal articles that experienced lawyers will enjoy reading. But it should be kept under lock and key for them and never handed to a beginner in the law.

ARTHUR JOHN KEEFFE
Washington, D. C.

BUSINESS LAW: PRINCIPLES AND CASES. *By John W. Wyatt and Madie B. Wyatt. New York: McGraw-Hill Book Company, Inc. 1958. $7.50. Pages 866.*

This textbook covers the fundamental principles of law which relate to the most common business transactions. It presents the principles of law supplemented with a selection of cases, problems and illustrations.

The subjects are presented in parts, chapters, divisions and sections. The cases are presented at the end of the chapters, followed by the case problems.

Emphasis is placed on presenting as many principles of law as might possibly be presented in the time allotted to business law; accordingly the various rules of pleading and practice which are indispensable in the hands of the lawyer and also the many theories of law which have assisted in the development of the law are omitted.

In determining the scope of the book, the authors were influenced to a great extent by the subjects covered by the C.P.A., C.L.U. and C.P.C.U. examinations. The following subjects therefore are covered rather extensively: contracts, agency, negotiable instruments, bailments, sales, partnership, corporations, security devices, real and personal property, wills and estates, trusts, bankruptcy, insurance, and short chapters on the employer and the employee and on government regulations of business. The Uniform Negotiable Instruments Law, the Uniform Sales Act and the Uniform Partnership Act are included as an appendix.

A "Student's Workbook" to aid the student in preparing the assignments is available.

An effort was made to present the most recent legal principles as well as earlier general principles; the reader is thus placed on notice of the changing character of law. In addition the book repeatedly warns the reader when he should seek advice from his lawyer.

Both authors have practiced law. Mr. Wyatt is now Professor of Business Law at the University of Florida. In 1952 he collaborated on the revision of Britton & Bauer's *Cases on Business Law.* He is an official of the Southeastern Regional Business Law Association.

It appears that this book is well designed for its principal purpose, to serve as a textbook on business law; and in view of the tendency of lawyers, even general practitioners, to become somewhat specialized, we suggest they would find it a good refresher course on business law.

BENJAMIN WHAM
Chicago, Illinois

FREEDOM, VIRTUE AND THE FIRST AMENDMENT. *By Walter Berns. Baton Rouge: Louisiana State University Press. 1957. $4.00. Pages xiv, 264.*

The predominant note of the greater part of Professor Berns's study appears distinctly to be one of indignation. He is indignant with the Supreme Court of the United States. More particularly, he is indignant with certain decisions and opinions of the Court in cases involving freedom of the press, of speech and of religion. Most particularly, he is indignant with certain views on these matters expressed by "libertarian" Justices. He feels that these views are so impregnated with emotional bias that "the law of the First Amendment is in a condition of confusion". His attitude towards the

Justices is exemplified by the assertion, culled at random, that in a certain important respect their meaning is "lost in the clouds of legal obfuscation".

No mere *tu quoque* retort is involved in the observation that the serious general reader will find much of Professor Berns's book confusing and, perhaps, confused. One difficulty about even stating his main thesis derives from the fact that, although he cites slightly over a hundred cases, he never states clearly the pattern according to which one of these cases is, rightly or wrongly, decided. The possibility that he assumes knowledge by his readers of this pattern does not seem especially strong in view of the fact that he feels constrained to state in a footnote that the First Amendment "is now considered to apply to state legislatures as well as the national Congress". This footnote refers the reader forward some forty-odd pages, at which point he is told that the proposition "that the Fourteenth Amendment incorporated the First Amendment" does not require his concern. Yet, if proper concern is to be had for clarity, precisely the opposite view would appear to have a considerably strong claim. In view of the greater number of cases of the kind involved arising in the states, the relationship between the First and the Fourteenth Amendments would seem to be so important that especial concern should be had for the pattern involved in Fourteenth Amendment cases.

Every serious undergraduate student of the American constitutional system —probably unlike, unfortunately, the great majority of general readers— knows that the Supreme Court of the United States has decided several hundred cases under the Fourteenth Amendment and that all of them conform to a fairly simple pattern. Such an undergraduate knows that every case involves objection by some *person* to something some *state* has done; that there should be clear identification of the person and, more important, of the state, inasmuch as the latter, being an abstraction, can act only through some agent or agency, the most interesting example often being the state legislature; that the person alleges that the state has *deprived him of liberty*— less often of life or property — *unreasonably* (state *denial* of equal protection of the laws or congressional *abridgment* of a First Amendment freedom—"absorbed" into liberty of the Fourteenth Amendment—conform to the same pattern); that the Supreme Court in attempting to determine what is reasonable undertakes to balance the claims of the person against the claims of society; that, the cases in the nature of things being close ones, sometimes the nice equilibrium of the balance tilts towards one side and sometimes towards the other; that the opinion of the Court is an attempted justification, or perhaps even rationalization, of the determined direction of the tilt; that the positions of the Justices are inevitably determined by their economic, political, social, and philosophical views; and that, accordingly, they frequently disagree vigorously with one another and, as long as this is a free country, may be disagreed with by Professor Berns and others as indignantly as they please.

There can be little doubt but that a careful statement by Professor Berns of the pattern of Fourteenth Amendment cases would have made his thesis and his general position much clearer. He is convinced that, in cases where a person—often not a very attractive one—pleads that he has been deprived of his liberty through abridgment of his freedom of religion, of speech or of the press, the Court causes the balance to tilt too often towards the individual, with the result that freedom rather than justice is elevated to the position of the highest virtue. It is, of course, perfectly possible that Professor Berns is on occasion in some sort right and the Supreme Court wrong. Certainly, many readers, even if regretting a tendency towards lack of restraint, will doubtless feel that Professor Berns has made a somewhat devastating case against the Court's employment of the "danger test" and its acceptance of a "preferred position" for the First Amendment. However, instances throughout experience are of course far from unknown where a good cause is on occasion supported by a bad argument; and this might sometimes be true even of the Supreme Court. So far as Professor Berns is concerned, he does seem to come somewhat close to begging the question when he asserts, with respect to cases in which he does not agree with the Court's belief that the balance should tilt in favor of the individual, that justice has been disregarded and virtue done a disservice.

Expression of reservation with respect to Professor Berns's arguments and conclusions clearly does not involve general defense of the Supreme Court, which doubtless feels that it can take care of itself. If the Justices denominated "libertarian" by Professor Berns have such strong convictions about freedom that they seem to him to be guided by emotion and to evaluate freedom too high, a possible answer is that historically the champions of liberty have always appeared thus to persons influenced by other emotions. Homely wisdom has persistently stressed the need of eternal vigilance in the matter; and protagonists of freedom have historically struggled vigorously and perhaps even singlemindedly for human rights, not presumably because they were incapable of understanding the relationship between rights and duties but because they were convinced that success in the presence of a threat to liberty demanded concentration of effort, whereas insistence in the same circumstances on the claims of duty had appeared clearly to be the stock in trade of the enemies of freedom. Careful study of the conditions in which the famous Declaration of the Rights of Man was formulated should prove highly rewarding to anyone who is interested in such things.

Professor Berns's desire for a specific definition, or formula, or standard, or criterion, or, as he calls it, "device" according to which there may be resolved with certainty on the side of virtue and justice all instances of conflict between the claims of individuals and the general welfare is no doubt shared by all right-minded people. The question would seem to be whether wishing—or any other effort — can yield such device. Professor Berns even appears to admit grudgingly once or twice that what he wants is, in any literal sense, unattainable.

At all events, he does not, it seems fair to say, come very close, in spite of his title, to formulating a definite meaning either in the case of freedom or virtue. He quotes with considerable effect Aristotle on the difference between a good man and a good citizen; he might well have culled from somewhere in the *Ethics* a dictum to the general effect that it is a mark of an educated man not to expect in connection with any matter more precision than the nature of the matter warrants.

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THE FRENCH LEGAL SYSTEM, AN INTRODUCTION TO CIVIL LAW SYSTEMS. *By Rene David and Henry P. de Vries. New York: Oceana Publications, Inc. 1958. $5. Pages 152.*

The authors of this book have achieved an objective which is seldom accomplished in writing about the civil law system. Normally such writings contain only profound, conceptual and bibliographical source data interesting primarily to the civil law expert. This volume, however, not only contains a reasonably complete legal bibliography, but it briefly surveys the major concepts of the French civil law and the atmosphere surrounding its administration with such superb simplicity and clarity that even those untrained in the law should find it of intriguing interest. In fact its authors modestly appear to express such a purpose of orientation.

By comparing the legal atmosphere of France which has been more receptive to the Roman law elements than England and America, the difference in the doctrines of the civil code world and the common law world becomes more apparent.

One of the difficulties enunciated by the authors which may impede our understanding of a foreign legal system is the existence of a legal profession in America and England which has a profound influence on the development of political and economic institutions. To the contrary, in France the law professionals such as the professors rather than the practitioners have been more instrumental in developing French law. This is indicated as somewhat of a natural result because common law development is premised upon the doctrine of *stare decisis* whereas the civil code system rejects inflexible case precedent for adjustment to social changes which are reflected by legal treatises used as persuasive guides only.

The authors also point out an interesting basic difference in the judiciary of the common law world and the civil code world of France. Being a judge in France, with few exceptions, implies membership in a judicial civil service with life appointment, whether as *juge de paix* or police judge, whether in a court of first instance or the *Cour de Cassation*. There are some lay judges who preside over specialized tribunals, and there is statutory authority for the direct appointment of law professors and practitioners to the Bench, but such appointments are rare.

In contrast, therefore, to England and the United States, where a judgeship in any court is often the climax of a lawyer's or a barrister's career, in France one can become a judge shortly after leaving law school, without prolonged practical experience. The result is that the Bench and Bar are separated by a formidable barrier of differences in temperament, training and approach. The French judge feels a far closer kinship with the professor of law than with the *avocat*, whom he tends to regard as a mere rhetorician.

Also discussed with considerable clarity is the French separation of legislative, executive and judicial powers, which is quite unlike the American concept. As vividly set forth, to this day the fear of a tyrannical executive has remained strong, the corollary being the desire for a weak chief of state. On the other hand, distrust of a government by judges still remains as the heritage of a people who had seen the *parlements* establish themselves as enemies of progress and reform. As might be expected, France's political organization rests on the notion that "national sovereignty belongs to the people", and that the will of the people is expressed through the *Assemblée Nationale*. In fact, the area between the parliamentary functions and administrative functions is not always clearly defined. The only restraining influence on the legislature is described as being political, not judicial, arising from within the organization of the legislature rather than through any system of checks and balances by another power.

In the authors' opinion, in many ways the French executive branch is more limited in powers and responsibilities than its American counterpart; paradoxically, there are certain situations where the French executive has more power than an American President could ever constitutionally exercise. The necessity of carrying on governmental functions in the face of recurrent periods of legislative inaction has led to the development and use of "decree-laws". A *décret* proper is an act of the *Gouvernement* corresponding roughly to the American executive order. A *décret-loi* is an executive decree based on a statute which confers full powers upon the executive to legislate for a limited period with respect to matters normally requiring an act of Parliament. Recent amendments to the French Civil Code and the Code of Civil Procedure have been effected by decree-laws rather than by formal acts of Parliament, and entire budgets have been passed by this measure.

Another perspective enunciated is that the control of the executive by courts of general jurisdiction is viewed in France as leading to the evil of "government by judges". Interference by the judiciary in administrative matters is forbidden; courts of general jurisdiction cannot annul administrative acts. There is an entire hierarchy of administrative courts lying outside the judicial branch of the government. Administrative acts are not thus reviewed as in common law systems by ordinary courts. Rather, the restraints are applied by the executive power itself through its own system of courts. Separation of powers in this area again means independence of the executive *vis-à-vis* the judiciary.

Exceptionally interesting and well considered is the analysis of the judicial power. To the extent that the separation of powers doctrine implies the independence of the judiciary from

legislative or executive pressure, the judiciary is described as a "power". But the authors add it is difficult for a Frenchman to regard the actions of French courts as the exercise of a "power" in the American sense of a system of checks and balances. Most controversies with any governmental aspect are not within the jurisdiction of the civil or criminal judiciary because the courts do not examine the constitutionality of statutes and are not the forum for review of administrative acts. The courts are further directed into a subordinate status by the recognition of codification as the primary source of law. Rule-making by the courts in matters of procedure and practice, normal in Anglo-American jurisdictions, is not a judicial function in France. Codes, laws and decrees regulate, sometimes in minute detail, the circumstances and proceedings of the work of the courts and those who practice before them. The courts also lack much of the power they have in Anglo-American jurisdictions because the Anglo-American sanction of contempt of court is nonexistent in France.

In the reviewer's opinion not only is French legal tradition eloquently and succinctly explained but the structure of the French law inclusive of its substantive and adjective phases is given erudite and enlightening treatment as are the subjects of interpretative techniques and authoritative guides.

One of these many interesting subjects considered is evidence. This is of particular interest because the latitude of evidentiary rules varies so greatly from that recognized in the United States. As pointed out by the authors, in reality, there is no French "law of evidence". The last important study purporting to cover as a whole the *droit des preuves* is over one hundred years old. In civil matters, the rules of evidence are found in different literary sources: rules as to competency in works on *droit civil,* the procedure for presentation of proof and taking of evidence (*administration de la preuve*) in works on civil procedure. There is no general analysis of rules of admissibility of proof. As a general proposition, the common-law rules of proof—*i.e.*, the rules applicable in the absence of a specific statutory requirement—are found in the Civil Code articles relating to proof of obligations. The situation is more perplexing in *droit administratif,* and even in criminal law the rules of evidence appear extraordinarily fluid and imprecise. As a general principle, it operates to permit the tribunal to receive any offer of direct or indirect proof and to weigh the evidence submitted in its sole discretion.

In criminal cases, it is indicated the stress is on oral testimony presented to the full court during a public trial; witnesses are examined by the presiding judge, not by counsel or prosecutor. In non-criminal actions, the word "trial" is inappropriate; the securing of evidence, the development of the legal contentions, the definition of relevant issues, take place gradually over an extended period of time until the case is ready for final determination; the record so compiled is then submitted to the full court with oral argument.

These two fine authors interpose the hope in their conclusion that the reader will be tempted to go further in the study of legal systems and countries with which his own will be increasingly interrelated. They have made a commendable and worthy contribution which should indeed arouse keen interest in the foreign law and its differences with our own common law system. This is important because we may best improve our own legal thinking by understanding the legal thinking of other countries.

EDGAR A. BUTTLE
New York, New York

AUTHORITY. *Edited by Carl J. Friedrich for The American Society of Political and Legal Philosophy. Cambridge, Massachusetts: Harvard University Press. 1958. $5.00. Pages viii, 234.*

This is the first annual volume of a series projected by The American Society of Political and Legal Philosophy to cover topics in and related to the law. As such it is labelled *Nomos I,* which Carl J. Friedrich, the editor, explains as "the broadest Greek term for law, because in this term there are also traditionally comprised the notions of a basic political order and of customs and a way of life".

The topic chosen for the first symposium of thirteen scholars is "Authority", a subject which is treated in general, in historical perspective and in socio-political perspective. It is when one gets into the sociological morass that one encounters animadversions rivalling some of the famed prize paragraphs of the Internal Revenue Code. But one need not despair at the display of professorial acumen for, as one of the contributors explains after twenty-five tedious pages of definitions: "It is furthest from the intention of this paper to be dogmatic about definitions of terms. Terminology in this area is not standardized and no one is entitled to legislate a particular usage." You can therefore take it or leave it, but in deciding there is much of merit for your consideration along the way.

Charles W. Hendel, in leading off the discussion of authority in general, makes the most significant contribution of the volume with the keynote distinction between authority and power, a salutary recognition of ambivalence in the political area and a plea for the choice of the concept of authority as more fruitful than that of sovereignty. Friedrich follows with emphasis upon the rational aspects with the thesis that "authority and reason are closely linked" in that there is or always should be at least "the potentiality of reasoned elaboration" in connection with all exercises of authority. Herbert J. Spiro discusses interrelations of authority, values and policies. He also emphasizes the need for clearly marking the distinction between power and authority. Jerome Hall delineates the place of authority in the law and Frank H. Knight closes the section with a realistic recognition that all is not rational. "Free society is largely a tissue of agency relations in politics and other spheres; hence the fitness of leaders for responsibility is a main problem for liberal efforts."

The historical perspective is considered by four contributors. Hannah Arendt deplores the loss of the Roman-inherited trinity of tradition, religion and authority in her extended discussion of "What Was Authority". Nor-

man Jacobson considers the founding of our country and the early manifestations here of authority. "If it is to be located anywhere, political authority in America may be found only in the impersonal document establishing the rules and limits of political conflict, the Constitution itself." George Catlin considers authority and its critics. He too stresses the fact that authority lies in reason. Wolfgang Kraus feels that a new authority is coming to life gradually with the progress made in puncturing the dominance evidenced in colonialism.

In the last section we have a treatment of authority in its socio-political perspective. All four contributors, Bertrand de Jouvenal, David Easton, Talcott Parsons and E. Adamson Hoebel consider the manifestations of authority in the political realm and in the areas abounding in and about it. All are concerned with fixing these boundaries within the jackets of definition. Hoebel gives a brief, simple and factual survey of authority in primitive societies.

An interesting exercise for anyone with the leisure to employ a logic Geiger counter would be to detect the evidences of polite disagreement among these thirteen titans of semantic disquisition.

LESTER E. DENONN
New York, New York

THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES. *By R. O. Wilberforce, Q.C., Alan Campbell and Neil P. M. Elles. London: Sweet & Maxwell. £4.4s. 1957. Pages 677.*

The purposes of the 1956 British Restrictive Trade Practices Act are succinctly stated in the Preamble. They are "to provide for the registration and judicial investigation of certain restrictive trading agreements, and for the prohibition of such agreements when found contrary to the public interest; to prohibit the collective enforcement of conditions regulating the resale price of goods, and to make further provision for the individual enforcement of such conditions by legal proceedings".

According to *The Economist*, March 1, 1958, by the end of January of this year, 1867 restrictive agreements had been submitted for registration. Of these, the Board of Trade has so far selected about two hundred, covering about forty different products, for submission to the Restrictive Practices Court. The first case may reach the court by autumn. It is reported that, once started, the Registrar hopes to keep up a regular flow of about forty cases a year, for which he has a full time staff of about thirty-five.

The Act provides that a restriction as to prices, terms, quantities or descriptions, processes, or persons or classes of persons, accepted in pursuance of any agreement shall be deemed to be contrary to the public interest, and thus void, unless the court is satisfied that any one or more of a list of circumstances would justify the restriction. Thus the court is given a jurisdiction far wider than that exercised by the United States courts under the antitrust laws. In this context *The Economist* observes:

> It is far more important that the first cases to come before the court should be well prepared than that they get there quickly. The Registrar has been able to draw at each stage on the advice of some academic economists—as, no doubt, the respondents have been too. Whether a court that contains no economist will be able to appreciate their arguments is another matter. Success of the procedure laid down in this Act, indeed, depends upon turning complex economic implications of industrial practice, and their relation to the "public interest," into a justiciable issue for the court to decide. In the United States, the questions before the court in anti-trust cases are essentially questions of fact: price rings, for example, are illegal there *per se*, and the court has merely to establish whether they exist or not. But under the British law the issues concern implications, actual or potential, not merely facts. This makes the new court's task harder than that of the American courts—which has been found difficult enough.
>
> ... But the mechanics of registration and the preparation of cases for the court have already had some good effects. Many agreements have been abandoned or revised so that they do not have to be registered, or so that, while still registrable, they can be more readily justified as in the public interest. Others—and this must be counted an initial victory for the Act—were abandoned after the signatories heard that the Registrar had decided to start proceedings, or are likely to be abandoned before they reach the court...

American lawyers will be interested in the make-up of the court given this exceptional jurisdiction. It is to consist of three judges of the High Court nominated by the Lord Chancellor, one judge of the Court of Session of Scotland nominated by the Lord President of that Court, one judge of the Supreme Court of Northern Ireland nominated by the Lord Chief Justice of Northern Ireland, and not more than ten other members appointed by the Queen on the recommendation of the Lord Chancellor. Any person recommended for appointment as a lay member shall be a person appearing to the Lord Chancellor to be qualified "by virtue of his knowledge of or experience in industry, commerce or public affairs". Any appointed member may be removed by the Lord Chancellor for inability or misbehavior, or on the ground of any employment or interest which appears incompatible with the functions of a member of the court. American lawyers will expect appointments and service of the highest degree in the case of judicial members; they will view with some skepticism, based on experience here, appointments from business and public affairs.

Mr. Wilberforce and his associates point out that between the time of Queen Anne and 1948 there was no legislation in the United Kingdom affecting monopolies or restrictive practices in trade apart from certain repealing legislation in the Nineteenth Century and the Trade Union Acts, 1871-1913. The Act of 1948, Monopolies and Restrictive Practices (Inquiries and Control) Act, set up an investigatory commission and provided for administrative action against individual practices reported on by the commission; it provided also for general reports to be made by the commission respecting categories or types of restrictive practices, and it was out of the general report on Collective Discrimination (Cmd. 9504) that the 1956 Act arose. The authors assert that the key to the character of the 1956 Act is to be found in the fact that, with the excep-

tion of export agreements, the Act is ultimately enforced by judicial, as distinct from administrative, machinery, though administrative machinery is set up in order that certain categories of restrictions may be brought before the courts.

To American lawyers it is interesting, as pointed out by *The Economist* on February 22, that the 1956 Act made individual price maintenance legally enforcible for the first time, and it curtailed the powers and activities of the Monopolies Commission. In terms at least, the Government gave industry an admitted *quid pro quo* in return for the outright banning of collective price maintenance, the open registration of a wide range of restrictive practices, etc. In these circumstances British industry and their lawyers have reason to be deeply grateful to Messrs. Wilberforce, Campbell and Elles for publishing as early as 1957 a definitive treatise on the law of restrictive practices. Well organized and well written, the book is remarkably comprehensive and convenient. It is a guide not only to the details of the 1948 and 1956 legislation but contains a comprehensive description of historical and common law background, the text of relevant statutes, the report of the Monopolies and Restrictive Practices Commission on Collective Discrimination, summaries of the reports issued by the Commission, and summaries of the law of the United States, France, Germany, Norway, Sweden and Canada.

The Restrictive Practices Act is a draftsman's dream, incredibly detailed and complicated. If it is also a lawyer's paradise, which has been suggested, it is a paradise to and through which the guiding, helpful hand of Mr. Wilberforce and his associates will seem angelic.

BETHUEL M. WEBSTER

New York, New York

THE SOCIETY OF CAPTIVES: *A Study of a Maximum Security Prison. By Gresham M. Sykes. Princeton, New Jersey: Princeton University Press. 1958. $3.75. Pages xx, 144.*

The modern prison system may be explained as a compromise between the traditional school of penological thought, which considers punishment as a measure of vindictive atonement for perpetrated and protective deterrence from prospective crime, and the emphasis of modern criminology on moral readjustment and protective segregation of convicted criminals as an essential purpose of punishment. The nature of a modern prison is indeed different from both extremes; it is not a place where cruelty is committed for the purpose of cruelly treating a prisoner, but it equally is not such a paradise for prisoners as that presented by the fictional prison in Strauss' famous operetta *Die Fledermaus* (*The Bat*). While the treatment of prisoners has been enormously humanized, life as a prisoner is still a substandard life, both physically and morally; the prisoner is still the subject of what the author of the present book calls "the pains of imprisonment", classifying them as "deprivation of liberty", "deprivation of goods and services" and "deprivation of heterosexual relationships", respectively.[1] The degree to which this hardship aspect of prison life prevails depends, however, to a measurable extent on the type of prison involved. Indeed, "the institutions in which criminals are confined in the United States today show a great variety, both in terms of their publicly announced procedures and their actual performance. There are prisons for men and for women, for federal offenders and for state offenders, for adults and juveniles. Institutions differ with respect to the extent of the psychiatric services which they provide, the nature of their work program, the stringency of custody, the number of inmates and so on. And on top of this variation, based on a deliberately designed penal policy, we find still other differences stemming from the exigencies of daily events and the personal philosophies of those charged with the responsibility of administering places of confinement."[2] The separation of male and female convicts runs through the whole modern prison system, and in addition to the "normal prison," like for instance the California state institution for male prisoners in San Quentin,[3] there are institutions for certain categories of prisoners who for various reasons require special treatment. One such category of special prison is the so-called maximum security prison, exemplified by the federal prison on Alcatraz Island[4] which among professional criminals has the reputation of being a hell of a prison and is therefore known by them as the "American Devil's Island". Maximum security prisons are designed for the safe custody of such kinds of prisoners who because of their viciousness or difficult manageability require special security measures to prevent them from escaping, to keep them from corrupting their fellow prisoners or from endangering the latter or for various other reasons. Or, as is said in the present book, maximum security prisons are custodial institutions reserved for criminals "who are thought to require extremely close supervision and control."[5] While in the nature of things detainment in such a prison is much tougher than in a normal penal institution, this is only incidental to, but not the purpose of the particular segregation. That purpose is to make it possible to afford better treatment to the majority of prisoners by removing those whose character or attitude would render such better treatment a practical impossibility.

The book under review, written by a political scientist at Northwestern University, is based on his investigation into and analysis of the situation at the New Jersey State maximum security institution for male prisoners, and contains sociological propositions which he makes in view of his knowledge of the conditions existing there. They are, however, likely to be applicable to other maximum security prisons, and in part even to normal prison institutions. He writes that despite the variety of types of prison "the observer must be struck by the basic similarities which exist among custodial institutions, for there seems to be a remark-

(Continued on page 88)

1. Pages 63-83 (page numbers, without further indication, refer to the book under review).
2. Pages xii, xiii.
3. Duffy, THE SAN QUENTIN STORY (1950).
4. Johnston, ALCATRAZ ISLAND PRISON AND THE MEN WHO LIVE THERE (1949).
5. Page xiii.

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Employers' Liability Act . . . *negligence*

Moore v. *Terminal Railroad Association*, 358 U. S. . . ., 3 L. ed. 2d . . ., 79 S. Ct. 2, 27 U. S. Law Week . . . . . (No. 208, decided October 13, 1958.) *On petition for writ of certiorari to the Supreme Court of Missouri. Writ granted, judgment reversed and cause remanded.*

In this brief *per curiam* decision, the Court did not trouble to set forth the facts, simply stating that "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

Mr. Justice HARLAN noted that he concurred in the result.

Mr. Justice FRANKFURTER noted that he was of the opinion that the writ of certiorari was improvidently granted.

Mr. Justice WHITTAKER, joined by Mr. Justice BURTON, wrote a dissenting opinion which stated the facts: the petitioner was employed by the respondent as a baggage handler in the St. Louis Union Station. He was hurt when the hand cart which he was pulling was struck by a moving train. The dissent argued that the record showed that the accident resulted solely from the petitioner's own negligence.

Evidence . . . *testimony against spouse*

Hawkins v. *United States*, 358 U. S. . . ., 3 L. ed. 2d . . ., 79 S. Ct. 136, 27 U. S. Law Week . . . . . (No. 20, decided November 24, 1958.) *On writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Reversed.*

In this case, the Court refused to abandon the ancient common law rule that a wife is incompetent to testify against her husband.

The case was a prosecution for a violation of the Mann Act. The testimony of the accused's wife was admitted over his protests and the Court of Appeals affirmed.

Mr. Justice BLACK delivered the opinion of the Supreme Court reversing. The Court said that while the old rule, rooted in the fiction that husband and wife are one person, has been modified in several ways, it was still reluctant to take the step urged by the respondent and permit either spouse to testify voluntarily. The reason for the rule, said the Court, the necessity for fostering family peace, "has never been unreasonable and is not now". The Court pointed out that other jurisdictions have been loath to do more than modify the rule. ". . . we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned", the Court declared.

The Court also refused to hold that the error in admitting the testimony was harmless. The wife's testimony brought out the fact that she was a prostitute, the Court pointed out. The mere presence of a wife as a witness against her husband in this kind of case, the Court said, would be likely to impress a jury, and use of the testimony of the wife was a "strong suggestion" to the jury that the husband "was probably the kind of man to whom such a purpose [transporting a girl across a state line for immoral purposes] would have been perfectly natural."

Mr. Justice STEWART wrote a concurring opinion—his first opinion as a member of the Court—which pointed out that the modification of the rule requested by the Government would be difficult to administer and would create the problem of determining when a spouse's testimony is really voluntary.

The case was argued by Kenneth R. King and Byron Tunnell for petitioner and by Kirby W. Patterson for respondent.

Interstate Commerce Commission . . . *power over rates*

Boston and Maine Railroad v. *United States, Chicago Burlington and Quincy Railroad* v. *Boston and Maine Railroad*, 358 U. S. . . ., 3 L. ed. 2d . . ., 79 S. Ct. 107, 27 U. S. Law Week . . . . . (Nos. 310 and 322, decided November 17, 1958. *On appeal from the United States District Court for the District of Massachusetts. Appeal dismissed without prejudice.*

The question here was the range of the Interstate Commerce Commission's power over the rates for car hire in railroading.

The controversy was between the short-haul terminal railroads on the one hand and the long-haul trunk line railroads on the other. The short-line roads, which are mostly engaged in switching operations, hire the cars of the long-haul roads at a *per diem* rate which, prior to this litigation, had been set by the Association of American Railroads. In 1951, after several terminal roads had announced that they would no longer comply with the current rates, at the behest of the long-haul lines the Commission held the *per diem* rates not in excess of reasonable compensation. The Commission acted under its power to issue declaratory orders, granted by Section 5(d) of the Administrative Procedure Act, and not under Section 1(14)(a) of the Interstate Commerce Act. The District Court, with one judge dissenting, rejected the contention that determination of a uniform rate was beyond the Commission's adjudicatory jurisdiction and lay exclusively in its 1(14)(a) rule-making power, but the court set aside the Commission's order on the merits.

The Supreme Court handed down a *per curiam* opinion in the case which said that the question of the Commission's authority under Section 5(d) was "prematurely presented for de-

Reviews in this issue by Rowland Young.

cision". The record now presented, the Court said, dealt with what was essentially only an "interim ruling". It dismissed the appeal "without prejudice to raising the 'adjudicatory' issue again . . ."

Taxation . . .
travel expenses

Peurifoy v. *Commissioner of Internal Revenue*, 358 U. S. . . ., 3 L. ed. 2d . . ., 79 S. Ct. 104, 27 U. S. Law Week . . . . . (No. 46, decided November 10, 1958.) *On writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Affirmed.*

In this case, the petitioners sought to deduct from their adjusted gross incomes expenses for room and board and travel while they were employed as construction workers at Kinston, North Carolina. Each of them maintained a permanent residence elsewhere in the state and sought to deduct the items under Section 23(a) (1) (A) of the Internal Revenue Code of 1939. The Commissioner had disallowed the deductions, but was reversed by the Tax Court, which was reversed in turn by the Court of Appeals.

The Supreme Court's opinion was *per curiam* and viewed the case as turning on a question of fact. The Court noted the general rule that travel expenses are deductible only when required by the "exigencies of business" and the exception which permits a deduction of such expenses when the taxpayer's employment is "temporary". The Tax Court had held that the employment here was temporary; the Court of Appeals found that this finding was "clearly erroneous". "In reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record", the Supreme Court said. "That being so, this Court will not intervene."

Mr. Justice DOUGLAS wrote a dissenting opinion in which Mr. Justice BLACK and Mr. Justice WHITTAKER joined. The dissent saw the question as one of defining the "home" of the taxpayers. "These construction workers do not have a permanent locus of employment as does the merchant or the factory worker", the dissent observed. "They are required to travel from job to job in order to practice their trade. It would be an intolerable burden for them to uproot their families whenever they change jobs . . . When they do not undertake this burden they are living 'away from home' for the duration of the term of the jobs."

The case was argued by Daniel R. Dixon for the petitioner and by Earl E. Pollock for the respondent.

An Early Trial
(Continued from page 34)

house, which he said stood on the contrary side of the way.

"5. Being, as he said, within two or three miles of Swamscote, where he left her, he went not thither to tell them of her, nor staid by her that night, nor, at his return home, did tell anybody of her, till he was demanded of her.

"6. When he came back, he had above ten shillings in his purse, and yet he said she would give him but seven shillings and he carried no money with him.

"7. At his return, he had some blood upon his hat, and on his skirts before, which he said was with a pigeon, which he killed.

"8. He had a scratch on the left side of his nose, and, being asked by a neighbor how it came, he said it was with a bramble, which could not be, it being of the breadth of a small nail; and being asked after by the magistrate, he said it was with his piece, but that could not be on the left side.

"9. The body of the maid was found by an Indian, about half a year after, in the midst of thick swamp, ten miles short of the place he said he left her in, and about three miles from the place where he landed by Merrimack, (and it was after seen by the English,) the flesh being rotted off it, and the clothes laid all on a heap by the body.

"10. He said, that soon after he left her, he met with a bear, and he thought that bear might kill her, yet he would not go back to save her.

"11. He brake prison, and fled as far as Powder Horn Hill, and there hid himself out of the way, for fear of pursuit, and after, when he arose to go forward, he could not, but (as himself confessed) was forced to return back to prison again.

"At his death he confessed he had made many lies to excuse himself, but denied that he had killed or ravished her. He was very loath to die, and had hope he should be reprieved; but the court held him worthy of death, in undertaking the charge of a shiftless maid, and leaving her (when he might have done otherwise) in such a place as he knew she must needs perish, if not preserved by means unknown. Yet there were some ministers and others, who thought the evidence not sufficient to take away his life."

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE

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Aeronautical Law . . . *flight easements*

Add to the cost of operating jet aircraft: payment for avigation rights over land adjoining the jet landing and take-off areas. The United States Court of Claims has ordered the Government to compensate several persons owning land near Luke Air Force Base in Arizona for the taking of easements of flight over their property.

The theory under which the Government is held to compensation is that the frequency and noise of the jet flights amounts to taking an avigation right for which it should pay, but in return it acquires the future enjoyment of the right without further payment. This theory is based on the United States Supreme Court's decision in *U. S.* v. *Causby*, 328 U. S. 256.

The Court concluded that the date of the taking as to some tracts was the commencement of jet aircraft operations at Luke in 1952, and as to others was 1954, when one runway was lengthened and another constructed.

As to the elements which constituted the taking, the Court declared:

> The interferences by the defendant's jet aircraft with the respective owners' use and enjoyment of the lands previously mentioned have resulted from the noise made and the disturbances created by such aircraft. The noise, averaging 105 decibels and approximating the situation inside a very noisy factory, is inordinately loud and annoying, and constitutes a definite hindrance to communication. As a result of the low and frequent flights of jet aircraft over the tracts of land involved in this litigation, the occupants of the tracts have become nervous and distraught, and farming operations on the tracts have become more difficult, more expensive, and less productive. These tracts have been rendered undesirable for normal residential use and for normal farming operations, and have suffered serious losses in value.

(*Adaman Mutual Water Company* v. *U. S.*, United States Court of Claims, October 8, 1958, *per curiam.*)

Attorneys . . . *division of fees*

A Missouri court, concluding that Canon 34 of the American Bar Association's Canons of Professional Ethics has terminated the old custom of forwarders' fees, has ruled that one lawyer cannot recover any part of the fee earned by a second lawyer on employment resulting from a referral from the first, when the referring attorney performs no services and takes no responsibility.

Canon 34 provides: "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility." This canon has been adopted in Missouri as a Supreme Court rule and thus it has the force and effect of law, the St. Louis Court of Appeals declared.

The trial court had awarded the plaintiff a judgment for one third of the $20,000 fee in dispute, apparently relying on and following a practice of the Bar in recognizing and paying a one-third forwarder's or finder's fee. There was no express contract governing the division of the fee. It was this practice which the Supreme Court of Missouri intended to prohibit by its rule, the Court said.

The plaintiff argued that he and the defendant had in effect formed a "special partnership" or a "joint venture" and that they could properly divide the fee. But the Court declared that an association of two lawyers for the purpose of a specific case or employment, no matter by what name called, must comply with Canon 34.

(*McFarland* v. *George*, St. Louis Court of Appeals, October 7, 1958, Ruddy, J., 316 S.W. 2d 662.)

Censorship . . . *motion pictures*

Chicago's motion picture licensing—or censorship—ordinance, no stranger to judicial challenges, has survived a constitutional challenge in the Court of Appeals for the Seventh Circuit, but the Court reversed the determination of the police censor and the mayor that the particular picture involved was immoral and obscene and ordered that an exhibition permit be issued.

It was not necessary for the Court to reach the question of the ordinance's constitutional validity, because it ruled that, assuming the ordinance valid, it was applied unconstitutionally in this case as there was no sound basis for refusing a license for exhibition to the film, *Mom and Dad*. "Nothing has been put forward by the city indicating just what in this film are its inherent evils", the Court declared in pointing out that the mayor's and police censor's refusal of a license had not spelled out any grounds. "A social problem requires defining and that has not been attempted here. Consequently the censorship results in a curb on free expression. . ."

The Chicago ordinance was upheld as constitutional by the Supreme Court of Illinois in *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, a case involving *The Miracle*, and the United States Supreme Court dismissed the appeal "for want of a final judgment" (348 U. S. 979) because the trial judge had ruled the ordinance invalid and had not determined whether, assuming its validity, it had been applied properly. On remand and second appeal, an Illinois intermediate appellate court held that a permit should issue for the film (13 Ill. App. 2d 278) and the Illinois Supreme Court denied leave to appeal. But, noting that the United States Supreme Court reversed its (Seventh Circuit) decision in another

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Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

case involving the Chicago ordinance, *Times Film Corporation* v. *Chicago*, 355 U. S. 35, the Seventh Circuit said that it was not foreclosed by the Illinois decision from "subjecting either the ordinance or its application to constitutional tests".

The Court viewed the condemned film and concluded that the refusal to issue a permit was unwarranted. In this connection the Court quoted and apparently applied the definition ascribed to the ordinance by the Illinois Court in the *American Civil Liberties Union* case: "[A] motion picture is obscene within the meaning of the ordinance if, when considered as a whole, its calculated purpose and dominant effect is substantially to arouse sexual desires, and if the probability of this effect is so great as to outweigh whatever artistic or other merits the film may possess. In making this determination the film must be tested with reference to its effect upon the normal, average person."

The Court concluded that the police censors and the mayor did not follow this standard in rejecting the picture. "Indeed", the Court declared, "we are curious as to whether the city censors viewed the identical film that we did."

(*Capitol Enterprises, Inc.* v. *City of Chicago*, United States Court of Appeals, Seventh Circuit, November 6, 1958, Finnegan, J.)

Courts . . .
Canon 35

An Oklahoma court has refused to reverse a criminal conviction on the ground that the trial judge permitted some of the trial to be televised. After the defendant objected to the procedure, the judge ordered no further pictures taken, but on appeal the defendant asserted that the telecasting deprived him of a fair and impartial trial and was in violation of Canon 35 of the American Bar Association Canons of Judicial Ethics.

Declaring that canons of ethics are "nothing more than a system of principles of exemplary conduct and good character", the Criminal Court of Appeals of Oklahoma ruled that whether court proceedings should be telecast or photographed was within the sound discretion of the trial judge, subject to general standards which the Court spelled out in its opinion. "In no other way", it said, "can the constitutional rights of all, the individual, the broadcaster, the press, and the public be reconciled. When abuses of discretion occur, we will meet them on appeal and not in a manner of preconception and on a basis of unrealistic presumption."

The "preconception" and "unrealistic presumption" references are to the language of Canon 35, which declares that photography and broadcasting "are calculated to detract from the essential dignity" of judicial proceedings and to "degrade the court and create misconceptions". The Court remarked: "Our experience is that when properly supervised by the court, there is neither disturbance, distraction, nor lack of dignity of decorum." At any rate, the Court said, telecasting is entitled to the same constitutional protections as the press, and the public is entitled to knowledge of activity in the courts through television just as it is through newspaper accounts. The canon therefore denies not only the reality that photographic and television coverage can be accomplished without distraction and disturbance, but also the reality of the constitutional protections, the Court stated.

Although it did not propose a changed text for Canon 35, the Court agreed with the conclusions of the Supreme Court of Colorado in *In re Hearings Concerning Canon 35*, 296 P. 2d 465, in which a canon permitting photography and broadcasting under consent and discretion of the trial judge was adopted. As with the Colorado procedure, the Court here indicated that such activities would be allowed only on a pool basis, which would permit the trial judge to deal with only one person responsible for all the photographic and television equipment used and would facilitate complete control over the amount and placement of equipment.

(*Lyles* v. *Oklahoma*, Criminal Court of Appeals of Oklahoma, September 3, 1958, Brett, J., 330 P. 2d 734.)

Immigration . . .
Hungarian refugees

The Court of Appeals for the Second Circuit, with one judge dissenting, has held that Hungarian refugees who came to the United States during the aborted Hungarian revolution, pursuant to our national policy as announced by the President, cannot be excluded from the country by termination of parole without a hearing and cause shown.

In the case in point the Hungarian family arrived here in December of 1956 and subsequently settled in Baltimore, where the husband became a milkman. At various times he had been questioned by Immigration and Nationalization Service officers about his former connections with the Communist Party, but at the final exclusion hearing in September of 1957, the sole issue and question was whether he had a visa. Of course, he didn't have a visa and everyone knew he didn't. He couldn't have gotten one because he had been admitted under the emergency provisions of a section of the Immigration and Nationality Act, 8 U.S.C.A. §182(d)(5); the visas that were available under the Refugee Relief Act were exhausted and the President directed the Attorney General to permit additional persons to enter without visas as parolees.

The Government contended that the refugee was not protected by the Constitution and that the case was a pure-and-simple exclusion case in which the parole, even though enlarged to permit the parolee to leave the initial place of detention, may be revoked without cause and without hearing other than to determine whether the immigrant has a visa. The petitioner argued that a hearing was required under the Act, at least in the case of Hungarian refugees, but that in any event he was entitled to procedural due process and thus to a hearing on the subject of revocation of the parole.

The Court agreed. "Under the special circumstances of the case of these Hungarian refugees", it declared, "we think their parole may not be revoked without a hearing at which the basis for the discretionary ruling of revocation may be contested on the merits."

The Court referred to the public actions of the President in directing the admission of the refugees to this country, and said: "By reason of the circumstances under which the Hungarian refugees were paroled into the United States this case is *sui generis* . . . If the Government position is sustained, any one or all of this large number of Hungarians who fled the might of Soviet Russia must leave our shores on the mere say-so of a Government official, however unreasonable or capricious this say-so may be, and even if there is no basis whatever for such a ruling."

The Court conceded that the President has no power to change law by making public addresses and sending messages to Congress, but it posited that his invitation to come to the United States, coupled with acceptance, effected a change in the status of the refugees from Hungary to entitle them to the protection of the Constitution and to due process in an exclusion hearing.

The dissenter, while sympathizing with the refugee, felt the law was clearly on the Government's side and should not be unbuckled because of the circumstances of the case.

(*U. S. ex rel. Paktorovics* v. *Murff*, United States Court of Appeals, Second Circuit, November 6, 1958, Medina, J.)

Labor Law . . . *union membership*

Affirming the district court's dismissal of the suit, the Court of Appeals for the Sixth Circuit has turned down the demand of Negro firemen for admission to membership in the Brotherhood of Locomotive Firemen and Enginemen, whose constitution limits membership to "white born". Resting its decision primarily on an exercise of judicial self-restraint, the Court declared that this was not "an appropriate case for interposition of judicial control".

The Brotherhood is the national collective bargaining representative of railroad firemen, in accordance with the Railway Labor Act, 45 U.S.C.A. §151 *et seq.* The Negro firemen contended that their constitutional rights were denied by their exclusion from membership, on the basis of race, from the exclusive collective bargaining agency which represents their craft. Alternatively, they argued that the Brotherhood had been guilty in fact of racially discriminatory practices. The Court agreed with the district court that the discrimination charges had not been proved and thus considered only the contention that exclusion from membership was an inherent denial of rights.

The Court examined the Railway Labor Act and concluded that by the absence of any provision to the contrary, the Brotherhood had a right to establish its own membership eligibility. It noted that Congress tabled an amendment to the Act refusing certification as bargaining representative to any union which denied membership on the basis of race. Under the Act, the Court continued, it is clear that individual employees have no direct control over the actions of the bargaining representative elected by members of the craft, except to vote for a different representative at a subsequent election. And, it noted, Negro firemen are not precluded from voting in the election of the bargaining representative.

Taking this view of the case, the Court concluded that the question was not one of racial discrimination, but only of the rights possessed by a laborer who finds himself in a minority or out-voted status. It concluded that American labor law is well settled that individual employees may be stripped of some individual rights in pursuance of a labor policy established by Congress and that a change should rest with Congress. The Court declared: "To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function."

The Court could find no analogy between the District of Columbia school segregation case, *Bolling* v. *Sharpe*, 347 U.S. 479, and the instant case, because it could not find the denial of membership to be the action of any agency of the Federal Government. The enactment by Congress of the Railway Labor Act without a provision requiring bargaining representatives to extend membership to all races in the craft could not be considered the necessary Government action, the Court said.

(*Oliphant* v. *Brotherhood of Locomotive Firemen and Enginemen*, United States Court of Appeals, Sixth Circuit, November 26, 1958, *per curiam*.)

Radio and Television . . . *functional programming*

With one judge dissenting, the Court of Appeals for the District of Columbia Circuit has blocked the Federal Communications Commission's order that broadcasters specializing in functional or background music programs must use multiplex transmission rather than their regular broadcast channel.

Functional programming is the name applied to an essentially background-type music program broadcast by an FM licensee. It is particularly useful for reception in commercial establishments, where subscribers pay the broadcaster for use of an electronic device that the station activates to cut out commercial announcements. Of course, the program with commercials may be received, also, and functional programming has been popular with the regular listener. For instance, the licensee involved in this case, a Chicago FM station, was shown by a 1955 survey to be the most popular FM-only station in Chicago during evening hours.

The Commission determined in 1955 that functional programming is not broadcasting within the meaning of the Communications Act and ordered functional broadcasters to transmit their background music programs as a secondary signal on a multiplexed transmission system, which permits transmission of multiple signals on a single FM channel. To support its conclusion that functional programming was not broadcasting, the Commission cited the specialized program content and the deletion of advertising in return for a charge.

With this the Court disagreed. It declared that neither program specialization nor program control by the listener necessarily determines whether an

activity is broadcasting. Functional programming, it said, answers the Act's definition of broadcasting as "the dissemination of radio communications intended to be received by the public". The Commission's finding that the programs were not directed to or intended to be received by the general public was clearly erroneous, it concluded.

The dissenting judge thought the Court was bound to uphold the Commission because it had made a public-interest determination required by law: that a specialized program service could not be permitted to pre-empt an FM frequency intended to be devoted to broadcasting.

(*Functional Music, Inc.* v. *Federal Communications Commission*, United States Court of Appeals, District of Columbia Circuit, November 7, 1958, Bazelon, J.)

Segregation . . . *courthouse restrooms*

A Negro lawyer in Norfolk, Virginia, has been unsuccessful in his attempt to persuade a federal court to order an end to racial segregation in the public restrooms of the local state courthouse.

The Court of Appeals for the Fourth Circuit has affirmed the decision of the United States District Court for the Eastern District of Virginia, which dismissed the plaintiff's complaint for an injunction but without prejudice to his right to seek a remedy in a state court. Whether the federal court should take jurisdiction of the case, the Court said, was within the "sound discretion of the district judge sitting in a court of equity". Concluded the Court: "The matter was one which affected the internal operations of the court of the state and [was] within its power to regulate."

(*Dawley* v. *City of Norfolk*, United States Court of Appeals, Fourth Circuit, October 15, 1958, *per curiam.*)

Segregation . . . *Little Rock*

The latest legal chapter in the Little Rock school segregation case is the issuance of an injunction by the Court of Appeals for the Eighth Circuit restraining the school board from leasing its property to the Little Rock Private School Corporation for the operation of segregated schools.

The Court has read the existing federal court orders as constituting a mandate to the school board to carry out the integration program. Therefore, the Court reasoned, the lease of school property to a private school corporation, which avowedly would operate segregated schools, was not only "inconsonant with the obligation of the decree but it would also directly complicate, impede and contribute to the thwarting or frustrating of the execution of the decree and the accomplishment of the integration mandated thereunder".

The present case had its genesis when the Eighth Circuit refused to grant the Little Rock board a two-and-one-half-year delay in carrying forward its integration plan. 257 F. 2d 33 (44 A.B.A.J.983; October, 1958). The Supreme Court of the United States affirmed (78 S.Ct. 1399) and later filed an opinion (78 S.Ct. 1401) which included this significant statement: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws."

The same day the Supreme Court announced affirmance, the Governor of Arkansas signed two acts which had been passed two weeks before by a special session of the Legislature. One empowered the Governor to close schools in any district and call for a referendum on whether racial integration should be allowed in the schools. This the Governor immediately did. The other measure made state funds available on a *per capita* basis in districts where schools had been closed by the Governor.

The Little Rock Private School Corporation was formed before the vote on the racial integration question, and as soon as the result of the vote against integration was known, the school board negotiated a contract with the private school group. The Court declared that the school board in doing this had acted voluntarily to avoid its obligation under the existing integration decrees, pointing out that a lease of school property was not required by any of the Arkansas legislation. It said: "They were simply yielding [to] the local desire or clamor and to the importuning of the Governor . . . That purpose plainly and proclaimedly was to try to thwart integration—the thing which [board members] were under judicial mandate to use their efforts and powers to achieve."

Several aspects of the contract between the school board and the private school corporation were emphasized by the Court. For instance, the lease included equipment and teaching facilities, an agreement to allow the private corporation to hire the system's teachers without loss of position or status, an obligation by the board to pay for maintenance and utilities, and an agreement by the private corporation to use the property only for school purposes. Rent was fixed at the actual market value of the property as determined at the end of each semester by appraisers.

(*Aaron* v. *Cooper*, United States Court of Appeals, Eighth Circuit, November 10, 1958, *per curiam.*)

What's Happened Since . . .

■ On October 13, 1958, the Supreme Court of the United States:

DENIED CERTIORARI in *Kovrak* v. *Ginsburg*, 139 A. 2d 889 (44 A.B.A.J. 684; July, 1958), leaving in effect the decision of the Supreme Court of Pennsylvania affirming an injunction enjoining a person not admitted to the Pennsylvania bar from practicing law or holding himself out as able to practice law in Pennsylvania courts, although the person was admitted to the bars of two federal district courts, one court of appeals and the United States Supreme Court.

DENIED CERTIORARI in *New Orleans City Park Improvement Association* v. *Detiege*, 252 F. 2d 122 (44 A.B.A.J. 366; April, 1958), leaving in effect the decision of the Court of Appeals for the Fifth Circuit that the proposition that denial of the use of public recreational facilities because of race is unconstitutional is too well-settled

to permit a court to hear testimony as to whether detrimental psychological factors are as prevalent in the maintenance of segregated recreational facilities as they have been held to be in public education.

GRANTED CERTIORARI and vacated judgment in *WIRL Television Company* v. *U.S.*, 253 F. 2d 863 (44 A.B.A.J. 474; May, 1958), in which the Court of Appeals for the District of Columbia Circuit had turned down an argument by a Peoria, Illinois, television licensee that the Federal Communications Commission illegally removed a VHF channel from Peoria and substituted a UHF channel, as part of a "deintermixture" proceeding. WIRL's petition for certiorari had noted statements made during congressional hearings relating to improper contacts with and influences on FCC members. The Supreme Court remanded to the Court of Appeals for appropriate action in the light of the allegations.

■ On November 17, 1958, the Supreme Court of the United States:

DENIED CERTIORARI in *St. Louis Amusement Company* v. *Federal Communications Commission*, 259 F. 2d 202 (44 A.B.A.J. 1084; November, 1958), leaving in effect the decision of the Court of Appeals for the District of Columbia Circuit that an applicant for a television channel that withdrew from the comparative hearing on the belief that one of the other applicants would win the license has no standing to challenge the successful applicant's later sale of the channel to another applicant, all of which resulted in substantial payments to the remaining unsuccessful applicants that did not withdraw.

■ On November 24, 1958, the Supreme Court of the United States:

DENIED CERTIORARI in *Hatahley* v. *U.S.*, 257 F. 2d 920 (44 A.B.A.J. 980; October, 1958), leaving in effect the decision of the Court of Appeals for the Tenth Circuit that the measure of damages for the United States Government's wrongful seizure of horses and burros belonging to Indians is the market value or replacement cost at the time of the taking, plus their use value during the interim between the time of the taking and the time they could have been replaced by reasonable exertion.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Legislative Ethics

After some years of investigating the faults of others, it apparently has dawned on some members of Congress that stated ethical standards for legislators as well as for administrative officials may be desirable. Although no measure has as yet been adopted, except an innocuous concurrent resolution couched in broad terms,[1] several bills have been introduced which would impose heavy restrictions on members of Congress as well as employees of the Legislative Branch. In a sense, they all follow the same pattern but there are differences in emphasis of sufficient importance to make a brief summary of the respective proposals desirable.

The first bill to be introduced in the Senate was offered by Senator Neuberger with Senator Clark as a cosponsor.[2] The measure has two principal features. First, it extends to members of Congress the "conflict of interest" statutes which restrict the activities of employees of the Executive Branch. Second, it requires disclosure by legislators of their sources of income and the value of their assets as well as their dealings in securities and commodities. Reports on these matters are to be submitted to the Comptroller General on forms prepared by him, and filing false reports would be punished as in the case of perjury.

A bill introduced by Senator Javits[3] contains a declaration of policy, pointing out the need for a code of ethics to guide federal officers and employees in situations where resort to criminal law would be unsuitable. This is followed by a general statement to the effect that no officer or employee should have any interest which is in substantial conflict with the proper discharge of his duties. Next, certain specific standards are established dealing with such matters as acceptance of employment, disclosure of confidential information and representation of an enterprise in which the officer or employee has a financial interest. Disclosure is required if the individual has an interest amounting to $10,000 or more in any activity subject to the jurisdiction of a regulatory agency. Provision is made for advisory opinions by the Attorney General or by the Public Advisory Committee on Ethical Standards. This committee, which is established by the bill, is also to study the matters in question, advise federal agencies regarding codes of ethics and make recommendations for revisions of the code of ethics and related legislation.

Perhaps the most elaborate of the measures before the Senate is the bill introduced by Senator Case.[4] It imposes a reporting requirement on members of Congress and other federal officers and employees whose compensation exceeds $12,500 per year. These reports require the disclosure of income, net worth and dealings in securities and commodities. The bill also amends the Administrative Procedure Act so as to require that communications made to an agency with regard to a case become a part of the public record. An accounting of funds used for official travel by legislative committees is prescribed. Finally, a Commission on Legislative Standards is created and directed to study and report on "problems of conflicts of interest and of relations with executive agencies which confront members of Congress. . ."

In the House, identical bills were introduced by Representatives Pelly[5] and Patterson.[6] Among other provi-

1. H. Con. Res. 175, 85th Cong., 1st Sess. (1957).
2. S. 3979, 85th Cong., 2d Sess. (1958).
3. S. 4078, 85th Cong., 2d Sess. (1958).
4. S. 4223, 85th Cong., 2d Sess. (1958).
5. H.R. 10631, 85th Cong., 2d Sess. (1958).
6. H.R. 13322, 85th Cong., 2d Sess. (1958).

sions, a Code of Official Conduct for the Legislative Branch is prescribed. The general scope of the law is similar to those previously discussed, but the provisions are more detailed and far reaching. For example, it is stated that it shall be improper conduct for any member of Congress or employee of the Legislative Branch of the Government "to accept . . . any unusual and valuable gift . . . from any person directly affected by or having a substantial interest in . . . legislation", to vote on any matter in which the legislator has a "substantial and direct financial interest" without prior disclosure, "to discuss or consider future employment by any person outside the Government" who has a substantial interest in pending legislation to intercede in an administrative proceeding other than by appearance of record, or "to become unduly involved, through frequent or expensive social engagements" with persons substantially interested in pending legislation. Former members of Congress are subject to certain restrictions and private individuals are forbidden to do the acts which are declared to be improper conduct on the part of members. The principal sanction as far as members are concerned is publication of a finding of improper conduct made by the Speaker of the House or the President of the Senate after notice and hearing. Disclosures of financial information of the sort previously described are also required.

Considering the proposals as a whole, two things become apparent. One is that a genuine concern is developing in the Congress regarding the ethical problems which are facing its members. The other is that no one has a complete answer to those problems. Indeed, the purpose of introducing these measures seems to have been not immediate enactment but rather the focusing of public attention on the situation in the hope that further study and debate might result in the development of workable legislation.

The task of drafting codes of ethics is, of course, a most difficult one and for this reason progress is likely to be slow. In part the difficulty arises because of the various levels on which ethical conduct may be considered. To a degree, conduct may be within the range of the criminal law. Here, the extension to members of the legislative branch of the "conflict of interest" laws now governing executive officers and employees may be practical. However, other situations arise in which the conduct in question may not descend to the level of criminality but may be such as to create lack of confidence in the legislative process. It is here that the problem of definition becomes acute. Questions as to the propriety of gifts, entertainment and the like will arise. To draft a statute which would invoke the sanctions of the criminal law or, indeed, which would provide for any kind of punishment would involve insuperable difficulties. Probably the best approach here would be to state standards and rules as precisely as possible but to use them as guides rather than as prohibitions the violation of which might result in the imposition of penal sanctions. This is the theory of the Javits Bill which, in addition to stating standards of conduct also provides a mechanism, somewhat like a grievance committee, for ruling on specific cases. Continuous study of the problem, as contemplated by both the Javits and Case Bills, may ultimately result in a more precise statement of standards than is now possible.

In general the bills rely on publicity as their chief sanction. Senator Case, particularly, views this as the most important element in dealing with the problem. In a televised interview he said, "If you tell the public what the facts are in any situation, you can almost always, in my judgment, rely on them to make the right decision about it."[7] The extent of the disclosures required by the bills varies somewhat, but in the main a complete report of sources of income is required as well as a statement of dealings in securities and commodities. Recognizing the invasion of privacy involved, proponents of the legislation view it as justified on balance, the social interest in disclosure outweighing the individual interest in privacy.

The extent to which reporting incomes and similar matters will actually result in publicity is debatable. The reports may well be buried in the Comptroller General's office. However, the availability of the information to the press with the consequent likelihood of publicity in particular cases should be of substantial benefit. Similar devices have been used in efforts to control lobbying and although their effect is doubtful, this is probably the result of public indifference which might not exist in connection with the activities of a member of Congress.

In addition to ethical questions involved in procuring favors in exchange for gifts and entertainment, a serious problem exists in the relationships between legislators and administrative officers in regulatory proceedings. It is quite common for an inquiry and, in some cases, a plea to be made by a legislator on behalf of a party to such a proceeding while the case is under consideration. Conduct which would not be tolerated by a court is sometimes accepted by administrative officials who are subject to the power of the purse held by the Congress. Some agencies have rules against such approaches. The solution offered by some of the bills under consideration, that all communications be made matters of record, may go far toward eliminating this abuse.

It should be remembered in this connection that some avenue of approach to administrative agencies by members of Congress is highly desirable. Through this channel many citizens in effect exercise their right of petition. To curtail the exercise of the right unreasonably would raise serious constitutional problems and would cut off valuable means of communication.

Whether or not the measures discussed above become law, the mere fact that the need for ethical standards has been recognized is in itself an indication of progress. Without being too sanguine about immediate practical results one may find encouragement in this evidence of public concern.

7. Meet the Press, Volume 2, No. 291 (August 3, 1958).

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth Liles, Washington, D. C., Chairman

New Election of Certain Corporations Not To Be Taxed As Such

By F. Daniel Frost, Los Angeles, California

One of the provisions of the Technical Amendments Act of 1958 that has created considerable discussion in business and legal circles is new Subchapter S[1] of the Internal Revenue Code, §§1371-1377, concerning the election of certain small business corporations not to be taxed on their net income as separate entities, but to have such income passed through and taxed to their shareholders.

Background— The 1361 Election

It will be recalled that in the Senate Finance Committee Report leading up to the Internal Revenue Code of 1954, it was proposed to adopt new provisions "which for the first time would eliminate the effect of the Federal tax laws on the form of organization adopted by certain small businesses".[2] Accordingly, legislation was drafted to allow certain proprietorships and partnerships to elect to be taxed as corporations and, as a corollary, to allow certain corporations to elect to be taxed as partnerships.[3] However, only the first of these elections was enacted in the 1954 Code.[4] The election by corporations to be taxed as partnerships was stricken by the Conference Committee.

The provisions as to the election of proprietorships and partnerships to be taxed as corporations created a new taxable entity in the tax law, sometimes referred to as a "1361 entity".

It is understood, however, that only a few businesses have made such an election. Such caution is understandable in view of the complex problems raised by the rather ambiguous language of the statute. For example, in a recent discussion on the subject by lawyers who represent 1361 entities, there was compiled a list of over two dozen currently unanswerable but very important questions covering problems that had arisen in actual practice.[5] For example, it is not clear whether the death of a 20 per cent electing partner during the year automatically terminates the election. Furthermore, few are so bold as to claim they understand the impact of the tax-free exchange and reorganization sections of Subchapter C on a 1361 entity or what happens to the undistributed earnings and profits once the election is terminated. Obviously, all of these problems cannot be attributed to draftsmanship (although there is evidence that the section was very hastily drawn). It is simply very difficult to foresee all of the numerous ramifications that can flow from creating an entity that does not exist in the non-tax law and has had no history under the tax law.

The Internal Revenue Service has encountered problems in drafting regulations under Section 1361. As yet, none have been promulgated, even in tentative form. Accordingly, the Mills Subcommittee, after reviewing the testimony before it on the subject, recommended that the section be repealed. The House version of the Technical Amendments Act of 1958 would have done that, but the Senate Finance Committee (which had introduced the 1361 election) amended the House bill to provide for the continuation of the section, recognizing at the same time that subsequent corrective legislation might be necessary.[6]

As a result, the 1361 election has been retained, but Section 63 of the Technical Amendments Act of 1958 has given a considerable amount of flexibility to electing organizations by allowing them to revoke the election within three months after the month in which regulations are published in the *Federal Register*.[7]

Thus, all existing 1361 entities are now in the position of being able to wait and see what the regulations provide before being finally committed to the election.

History of the 1371 Election

In addition to reinstating Section 1361 in its version of the Technical Amendments Act of 1958, the Senate Finance Committee once again proposed a complementary election for certain "small business" corporations.[8] However, this time the approach was not to allow them to elect to be taxed as partnerships, but rather to permit them to elect to have their taxable income taxed to their shareholders. The Senate Finance Committee Report[9] indicates the Committee believed these new sections would be primarily beneficial, in those situations where the earnings are left in the business, to those individuals who have tax rates below the applicable corporate rates. Where the earnings are distributed and are in excess of what may properly be classified as salary payments, it is believed that the benefit will extend to individuals with somewhat higher rates since in this case the double tax on dividends is removed. Since the provisions also permit corporate net operating losses to offset the income of shareholders, they are recognized as being of substantial benefit to small corporations realizing losses for a period of years where there is no way of offsetting these losses against tax-

1. Technical Amendments Act of 1958, §64.
2. Sen. Rep. No. 1622, 83d Cong., 2d Sess., 118 (1954).
3. Sen. Rep. No. 1622, 83d Cong., 2d Sess., 119 (1954).
4. IRC §1361 (Subchapter R).
5. See *Unincorporated Business Enterprises Electing To Be Taxed as Domestic Corporation —Section 1361* by Louis M. Brown, 1955 So. Calif. Inst. 281.
6. Sen. Rep. No. 1983, 85th Cong., 2d Sess., 86 (1958).
7. Technical Amendments Act of 1958, §63.
8. Sen. Rep. No. 1983, 85th Cong., 2d Sess., 87 (1958). The Senate Report notes that a general provision of this type had been recommended by the President's Cabinet Committee on Small Business and the President in his budget message in January, 1958.
9. Sen. Rep. No. 1983, 85th Cong., 2d Sess., 87 (1958).

able income at the corporate level.[10] The Senate Finance Committee proposal was approved in the Conference Report and now comprises Sections 1361-1377 of Subchapter S. As will be seen, the benefits flowing from Subchapter S are much broader than indicated in the Senate Report.

General Comparison of the 1361 and 1371 Elections

In comparing the two elections, it is helpful to keep in mind the general rule that under a 1361 election the resulting tax "entity" is a corporation only for certain specific purposes. On the other hand, under the 1371 election the corporation is a true corporation for all purposes except as to the incidence of tax and certain rules flowing therefrom. Accordingly, under a 1361 election the owners of the enterprise are not employees for purposes of qualified profit-sharing or pension plans or for purposes of the tax on self-employment income. On the other hand, under a 1371 election the shareholders of the electing corporation are considered to be employees for these purposes (a substantial change from the 1954 proposal[11]). Other rules of taxation under the 1371 election make sense only when one keeps in mind this rather confusing situation that the electing corporation is still considered to be a corporation for all purposes other than the incidence of the tax.

It appears that Congress must have believed there was more possibility of tax savings under the 1361 election than under the 1371 election, since under the former election income can be split between the taxpayer and the entity. In any event, the use of the 1361 election (with certain exceptions) was limited to businesses where capital is a material income producing factor,[12] and unless there is a specified change in ownership, the election is irrevocable once it is made.[13] Moreover, termination of the election appears to have the same tax consequences as a corporate liquidation. However, surprisingly, the tax saving possibilities in a 1361 election are accentuated by the fact that the election may be made retroactively,[14] thus obtaining the shelter of the corporate tax rates after the exact amount of taxable income has been ascertained.

In contrast, the provisions of the 1371 election are available to any type of business, no matter how large, as long as more than 20 per cent of the gross receipts are not from foreign sources and do not consist of certain types of "passive" income (similar, but not identical, to personal holding company income).[15] There are certain prerequisites to the election, most important of which are that the corporation must be domestic, that the shareholders must all be individuals or estates and cannot exceed ten in number, that there can be only one class of stock,[16] and that all shareholders must consent to the election. The provisions are very flexible as to termination or revocation of the election, and by reason of the nature of the election, this step does not constitute a taxable event. However, Congress (apparently feeling that making the 1361 election available on a retroactive basis was a mistake) provided that the 1371 election must be made during the first month of the taxable year, or during the prior month (except for certain special rules as to taxable years beginning before September 3, 1958, and ending after that date).[17]

Mechanics of the 1371 Election

The Internal Revenue Service has issued temporary regulations to TD 6317[18] covering the mechanics of making the Section 1371 election. The election itself is to be made by the corporation on new Form 2553. Attached to the form must be a consent signed by all the shareholders. A new shareholder must file a statement of consent within thirty days beginning on the day on which such person becomes a new shareholder.

Possibilities of Additional Tax Savings Under a 1371 Election

Although, as already noted, the principal purpose of Subchapter S was to allow the selection of the form of organization desired for a business without the necessity of taking into consideration major differences in tax consequences, these new provisions afford additional possibilities of tax saving which will undoubtedly be of great interest to tax practitioners.

For example, there is the common situation where a client can neither liquidate his corporation nor sell his stock because of the fear that the corporation may be classified as a collapsible corporation. It would appear that such a corporation could elect not to be taxed as a corporation, sell its assets and (assuming such assets would produce capital gain) pass through the gain to the shareholders without double tax and at the capital gain rates. This results from the fact that capital gain (but no other type of taxable income) at the electing corporate level retains its character at the shareholder level. This possible use of a 1371 election to avoid the collapsible corporation problem is of special interest to certain industries, particularly independent motion picture and television producers and land developers.

As another example, take the situation where for various reasons a buyer will only buy assets of the selling corporation, and yet its shareholders want the benefit of the installment method of treating the gain (Section 453). Although Section 337 might be available for sale of the assets, it will not result in the installment method of taxation to the shareholders since under the general rule they must immediately report the fair market value of any installment contracts or notes received in the liquidation of the selling corporation. However, if the selling corporation makes a 1371 election, and sells assets on the installment method, then the shareholders would include in their gross income only the taxable income of the corporation as limited by the provisions of Section 453.

Another possibility that has been discussed is the use of the 1371 election to escape the penalty provisions for unreasonable accumulations of earnings. A corporation which would other-

10. Sen. Rep. No. 1983, 85th Cong., 2d Sess., 87 (1958).
11. Sen. Rep. No. 1622, 83d Cong., 2d Sess., 119 (1954).
12. IRC §1361 (b) (4).
13. IRC §1361(e).
14. IRC §1361(a).
15. IRC §1372 (e) (5).
16. See Technical Information Release 113 for examples of situations that do and do not meet this requirement. TIR-113 was issued November 26, 1958.
17. IRC §1372(c).
18. 1958-6 CCH Fed. Tax Rep. Para. 6716.

wise be compelled to distribute earnings in order to escape the penalty tax could elect under Subchapter S, thus avoiding the application of Section 531 for the future and avoiding the double tax on corporate earnings distributed as dividends.

One of the most important and practical benefits available under a 1371 election is that the owners of the business can participate in qualified profit sharing or pension plans. Further, they can participate in other so-called fringe benefits, such as group life insurance, group medical and health and accident coverage and wage continuation plans. Even though the owners of the business obtain no savings in tax rates from incorporating and then making a 1371 election, they might obtain substantial tax benefits from one or more of these programs.

An additional possibility which should be mentioned is the flexibility offered by a 1371 election in selecting a fiscal year for the business other than the reporting year of the owners. For example, a newly created electing corporation, unlike a partnership (Section 706), apparently can select any taxable year it desires. The undistributed taxable income of the electing corporation is included in the income of its shareholders in their taxable year in which the corporation's taxable year ends. Therefore, if the corporation selects a January 31 taxable year, and its shareholders are on a calendar year, the tax on eleven months of income can be deferred for a full year.

Also, a partnership business could be thus incorporated and its accounting method might be changed where a desired change might not otherwise be available.

Special Problems Involved in the 1371 Election

One of the important problems presented by the 1371 election arises from the fact that the different shareholders usually have different personal tax brackets and therefore the election might create a hardship as to some while producing a benefit to the others. Since the election requires unanimous consent of the shareholders, individual differences must be reconciled before any election is possible.

Furthermore, since the election is terminated if stock is transferred during the taxable year and the new shareholder does not consent to the election, a question is raised as to how to insure that the election will not be terminated at an unpropitious time. Depending upon the applicable state corporate law, it might be possible to provide options to purchase or rights of first refusal in the by-laws, articles of incorporation, or in an agreement between the shareholders, so that the remaining shareholders could control the conditions surrounding the entry of a new shareholder into the picture. If possible under applicable law as to restraints upon alienation, it might be preferable to have some sort of self-executing provision to the effect that any transfer or issue of stock would be void unless the new shareholder consented to the 1371 election.

Another problem is raised by the fact that the corporation's loss carryovers from years prior to the effective date of the election cannot be used in computing the taxable income of the corporation which is taxable to the shareholders. Such carryovers thus might be lost altogether, depending upon the duration of the election.

Although an electing corporation can, without dividend consequences, distribute to a shareholder his share of the corporation's "undistributed taxable income" for prior years (such income having already been taxed to the shareholder even though not distributed), it appears that once the election is revoked, any such income left in the business will be locked in the corporate entity and cannot be distributed except as a dividend until all earnings and profits have been distributed. Furthermore, it also appears that once stock in an electing corporation is sold, the selling shareholder's pro rata share of undistributed taxable income accumulated during an election year is also locked in the corporation. If distributed to the purchaser, it is not treated as a return of capital.

An additional problem to be noted is that certain types of corporate income will not be taxed to the shareholders if undistributed, but will be taxed when and if distributed. For example, exempt income would not be taxed to the shareholders since it is not taxable income of the corporation. However, it appears that such income will increase the earnings and profits of the corporation under the general rule,[19] and thus when actually distributed to the shareholders will be taxed under Section 301.[20] Similarly, although the percentage depletion allowance will reduce the taxable income of the corporation which must be included by the shareholders in their gross income, even if not distributed, nevertheless under the general rules,[21] the earnings and profits are increased by the excess of percentage depletion over cost depletion, and if the amount allocable to such excess is actually distributed to the shareholders, then it would be taxed under Section 301.

Although in a 1371 election year the provisions of Subchapter C dealing with taxability at the corporate level are not applicable, the provisions of Subchapter C as to the taxation of the shareholders apparently are applicable. Thus in a redemption agreement the rules of Sections 302-304 apply. This means that counsel will have to be very careful in planning redemptions of stock by an electing corporation, particularly where earnings and profits of pre-election years are present.

In community property states a question is raised whether a husband and wife holding stock as community property constitute one or two shareholders for the purpose of meeting the requirements of Section 1371. If the shares are registered in the name of the husband alone, but the wife has a community interest, it would seem logical that such shares be deemed held by only one shareholder. However, the Internal Revenue Service has recently taken the opposite position in Technical Information Release 113. Although this position of the Service is not believed correct where the shares are registered in the name of the husband alone, it appears to have merit where the shares are registered in the name of both husband and wife, even though the wife's interest is solely a

19. Reg. §1.312-6(b).
20. See Sen. Rep. 1983, 85th Cong., 2d Sess., 219 (1958).
21. Reg. §1.312-6(c).

community interest. The reason for this is that the very fact that the wife is a registered shareholder creates certain obligations to her on the part of the corporation. In this same connection, TIR-113 further states that where stock is held by tenants by the entirety, tenants in common or joint tenants, then each co-owner is to be counted as a shareholder. Further, where stock is held in the name of a guardian or custodian for two or more minors, each minor is to be counted as a shareholder.

With reference to the definition of "an individual" for purposes of determining qualifying shareholders, TIR-113 indicates that although a testamentary trust would not qualify, stock held by a guardian for the estate of a minor, or by a custodian for the benefit of a minor would qualify since the legal and beneficial owner of the stock is the minor.

Although one of the natural uses of an electing corporation would be to hold title to realty, such a corporation could not qualify unless at least 80 per cent of its gross receipts were from sources other than rent, or unless it had no income at all. In this connection, however, it should be noted that in TIR-113, the Service has stated that income derived from the operation of a hotel or a motel is not considered to be rent for purposes of determining qualification for the 1371 election, even though such income includes charges for lodging as well as for personal services.[22]

Although a bank and, under certain circumstances, a licensed personal finance company under state supervision are exempt from the personal holding company provisions even though their income consists largely of interest, such organizations cannot qualify for the 1371 election if more than 20 per cent of gross receipts is derived from interest, since they are not exempted from the income requirements for such an election.[23]

Conclusion

It appears that in addition to accomplishing the general purposes for which it was established, the 1371 election has a scope far beyond the original intention of Congress, so much so that remedial legislation seems inevitable. Further, as in the case with any new and complicated taxing provision, it will undoubtedly raise many problems as to interpretation and congressional intent. Finally, since it is understood that the Treasury is gravely concerned about the possible use of the 1371 election solely to avoid the impact of certain provisions of the Code as to a specific transaction (for example the provisions as to collapsible corporations), the possibility should be kept in mind that in the regulations to be promulgated under Subchapter S the Treasury might attempt to prevent the use of the election in such instances.

22. See for analogy Reg. §1.512(b)-1(c)(2) concerning the definition of rent from real property for purposes of unrelated business income.
23. TIR-113 (issued November 26, 1958).

The President's Page

(Continued from page 4)

answers to these and other pertinent questions which, in turn, will be the basis for the new and expanded program of continuing legal education envisioned as the product of the Conference.

Regardless of how good a program comes out of the Conference, its benefit to the profession will be determined entirely by the extent to which it is implemented and reflected in stepped-up activity in the individual states. This will be in the hands of the Conferees and will be their responsibility—one which each of you is in a peculiarly favorable position to perform.

The selection of Arden House as the site for the Conference contributes much to the potential success of the Conference. It is the home of the American Assembly, originated by President Eisenhower when President of Columbia University. The Assembly technique of discussion and arriving at a consensus through use of small discussion groups and an ultimate combination of these groups and their conclusions into a single statement of the results of the Conference is well adapted to the objectives of the Conference. The location and facilities of Arden House insure a working conference in the most pleasant surroundings.

It is important that you familiarize yourself with the advance materials which will be furnished to each of the Conferees and that you enter fully into all discussions in order that the Conference may have the benefit of the experience of all of its participants.

We anticipate that the Conference not only will be a stimulating and beneficial experience for the conferees, but that it also will be thoroughly enjoyable. We are looking forward to participating in it with you.

Cordially yours,

HARRISON TWEED
President
The American Law Institute
ROSS L. MALONE
President
American Bar Association

BAR ACTIVITIES

Raymond H. Dresser

Raymond H. Dresser, of Sturgis, was elected President of the State Bar of Michigan at its Annual Meeting in October. Other officers are Burney C. Veum, of Sault Ste. Marie, First Vice President; Ernest C. Wunsch, of Detroit, Second Vice President; Louis H. Charbonneau, of Detroit, Secretary; and Carroll C. Rushton, of Marquette, Treasurer. Milton E. Bachmann, of Lansing, is the Executive Secretary.

Warren Olney III, Director of the Administrative Office of United States Courts, was the speaker at the general luncheon, and the banquet speaker was New Zealand's Ambassador to the United States, Sir Leslie Munro, who is a past president of the Assembly of the United Nations.

Other speakers were Edson L. Haines, Q.C., of Toronto, whose topic was "The Disappearance of the English and Canadian Civil Juries"; Professors Bernard J. Ward, of Notre Dame, and Philip B. Kurland, of the University of Chicago, who teamed up on "The Role of the United States Supreme Court in the American Constitutional System"; Professor W. Willard Wirtz, of Northwestern Law School, who discussed "Due Process in Arbitration". Estate planning was well covered by Austin Fleming, of Chicago, Joseph Trachtman, of New York, and Willard H. Pedrick, of Northwestern Law School.

The Committee on International and Comparative Law received special attention because of its report on "Legal Problems of Outer Space" and "Establishment of World Peace Through World Law".

One of the important adjuncts to the meeting was the first grand-scale session of the Lawyers Wives of Michigan, recently established as a non-profit corporation. Nearly 250 ladies attended business sessions and heard Brigadier General S. L. A. Marshall, military critic of the *Detroit News*, who had just returned from the Middle East.

George L. Hibbard

Over seven hundred members attended the Annual Meeting of the Oregon State Bar at Gearhart, September 24 to 27. George L. Hibbard, of Oregon City, was elected President, succeeding George W. Neuner, of Roseburg, who presided at the meeting.

An indemnity insurance plan, whereby a fund would be created to be administered by the Board of Governors to indemnify clients who might be defrauded of their money by lawyers, was approved by the meeting after a spirited debate. The fund will be created, the plan provides, by increasing the dues $15 a year until a reserve has been established. The additional $15 will be set aside as a trust fund to be known as "The Indemnity Fund of the Oregon State Bar". It will not be available for any other purpose. While the plan has been approved by the membership, it is still the subject of a great deal of discussion and a substantial amount of dissatisfaction. Unless a special meeting of the Bar is called at which the action of the annual meeting is reversed, the proposed legislation set forth in the report of the Committee on Indemnity Insurance will be submitted to the 1959 session of the Legislature of the State of Oregon which convenes on January 12.

Other officers elected at the meeting are Carl G. Helm, Jr., of LaGrange, Vice President, and Paul A. Sayre, of Portland, Treasurer. John H. Holloway, of Portland, is Secretary.

The Kentucky State Bar Association is the result of an act passed at the 1934 session of the Kentucky General Assembly authorizing the Court of Appeals to organize a bar association. The act contains a provision by which the legislature recognizes that the Judiciary occupies exclusive jurisdiction in this particular field. The provision reads: "The rules of court adopted and promulgated under this section shall supersede all laws or parts of law in conflict therewith, to the extent of the conflict." This is a very useful and interesting provision.

Every organization experiences a need for change—many of an immediate nature—and the flexibility of this provision could hardly be improved upon. In addition, the act directs the Court of Appeals to make the Association a part of the judicial system of the Commonwealth.

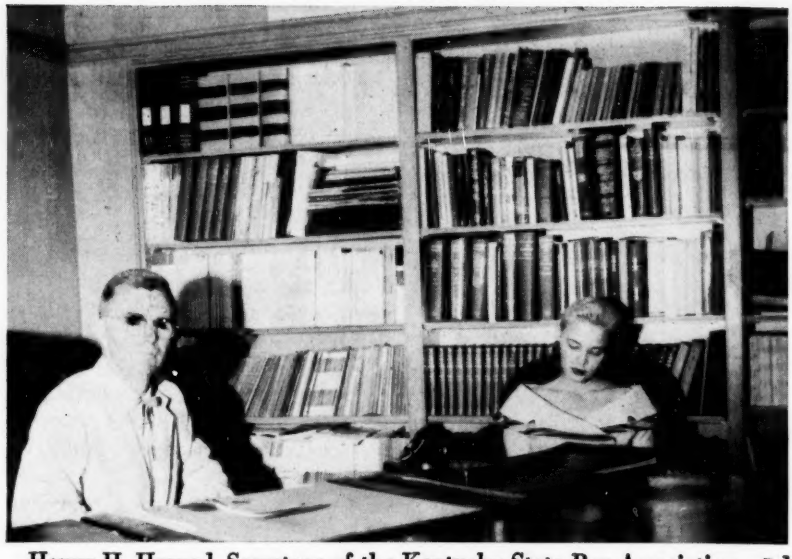
The Kentucky State Bar Association is governed by a Board of Bar Commissioners, composed of fourteen members, two lawyers from each of the state's seven appellate districts, elected for two-year terms, each district electing one new member each year. The officers of the Board consist of a President, Vice President, President-Elect, Secretary, Treasurer and Registrar.

The Board has fourteen standing committees each composed of at least one attorney from each of the appellate districts with a member of the Board acting as chairman. Each member's term of appointment runs for three years, at which time he may be reappointed or replaced. Customarily, each incoming President appoints two new members to each of the Commit-

tees to serve with the four holdover appointees, thereby providing a continuity not experienced if a full new committee were appointed each year.

The Board aids and assists all Committees, considers and passes on all reports and actions of the various committees; renders advisory opinions to members of the Bar on contemplated or existing courses of conduct that may involve matters of ethics; holds hearings and makes recommendations in all disciplinary cases—all of which is subject to review by the Court of Appeals.

An examination of the record shows that the Kentucky Bar has often been "ahead of the times". While many of its proposals have not been promptly accepted, fortunately the greater portion of legislative and judicial programs advocated by the Bar have been adopted. While the Association as such does not propose to claim all the credit, it has provided a forum for public spirited lawyers and judges interested and willing to work for their profession and the public welfare. In 1951, the Kentucky Bar won the American Bar Association's Award of Merit. Proposals for the improvement in the administration of justice, programs calculated to be in the best interest of the Bench and Bar and activities engaged in for the direct welfare of the practicing lawyer himself have included the following: publication of a *Bar Journal* and district Bar meetings throughout the state; the Association sponsored a revision of the Kentucky statutes resulting in a saving of thousands of dollars annually to the Kentucky lawyers; it has sponsored acts to provide for the payment of pensions to judges upon retirement; an act to provide for expenses to the judges of the Court of Appeals; an act to provide for law clerks for the Court of Appeals; it has worked for legislation conferring on the Court of Appeals the power to regulate rules of pleading, practice and procedure; and it sponsors a Young Lawyers Conference. The Association advocated constitutional revision, a court building and salary increases for judges. It has adopted a statewide minimum fee schedule. It has obtained for its members group health, accident and major medical insurance, and at the present time plans for group life insurance have been submitted to the membership at rates lower than the National Service policies.



Henry H. Harned, Secretary of the Kentucky State Bar Association, and his secretary, Mrs. Gaines Davis, in the Headquarters of the Association.

Possibly the most outstanding program ever attempted by the Association is the organization and incorporation of a title insurance company. The common stock of the corporation is held by the Kentucky Bar Foundation and the profits will be used to provide scholarships for worthy law students, public relations activities and other programs in the field of public service.

In addition, the Association has in its twenty-four years of organized existence acted as an agent of the Court of Appeals by enforcing its rules. One hundred twenty-eight disciplinary cases have been heard resulting in the Board's recommending discipline in sixty-nine. During that time, upon recommendation of the Board, thirty-five attorneys have been permanently disbarred, twenty-four suspended and ten reprimanded as provided by the rules.

The Association has from time to time been of aid to the Legislative and Executive Branches of the state governments as well as the Judicial. The chief executive of the state recently requested the Association to aid in bringing ouster proceedings against a public official. The Legislative Branch often advises with the Bench and Bar, especially in matters of legislation affecting the Judiciary.

In the interest of better public relations, the Association offers scholarships to law students and presents numerous awards and citations for legal papers and historical essays to students as well as certificates of merit for outstanding service.

The Court of Appeals has provided air-conditioned offices for the Association on the second floor of the state capitol building. The main office is 18 x 12 with limed oak panels, wall-to-wall carpeting, venetian blinds and indirect lighting from 18 foot ceilings. Stenographic and mailing services are performed from two rooms, one 24 x 14, another 14 x 8 feet. In addition, conference rooms are always available through the co-operation of the Court and the Judicial Council. These offices are equipped with phones, manual and electric typewriters, calculating machines and reproducing facilities.

These offices and the services of the Secretary are available to lawyers and judges in contacting public officials throughout the state, and they make available to the members any other service requiring personal attention in the state offices at Frankfort so long as such service does not require the practice of law. Being on the same floor with the Court, the Judicial Council, the Clerk's Office and the State Law Library makes the location most

convenient.

Finally, the work of all committees is handled through the Secretary's office and the financial affairs of the Association are in charge of the Treasurer subject to the direction of the Board. At the present time both duties are handled by the same person.

Graham L. Sterling, Jr.

The 1958 Annual Meeting of the State Bar of California was held at historic Hotel del Coronado, Coronado, California, October 6 through 10.

It opened with the meeting of the Conference of State Bar Delegates. Sixty-five voluntary local bar associations were represented at that conference which ended on October 7.

On the same days the Conference of California Judges met. That conference was attended by more than 200 members of the trial and appellate courts of California.

Throughout the week there were conferences of Hearing Officers, District Attorneys, Public Defenders, and meetings of such groups as the California Law Revision Commission, Judicial Council committees, the Joint Legislative Committee on the Administration of Justice, and the Conference of Barristers of the State Bar.

The formal Annual Meeting program opened October 8, with addresses by Goodwin J. Knight, Governor of the State of California, State Attorney General Edmund G. Brown, and William P. Rogers, Attorney General of the United States.

Other speakers during the week were Erwin N. Griswold, Dean of the Harvard Law School, and General Bernard A. Schriever, Commander, Air Force Ballistic Missile Division.

The nearly two thousand lawyers and judges in attendance heard panel discussions on "Discovery in Civil Proceedings", "Condemnation", "Discovery in Criminal Cases, Present and Future", "Recent Corporate Problems", "The Lawyer's Role Before Legislative and Administrative Bodies" and "Fees and Your Public Relations". A "Trial Practice Demonstration" before a live jury concluded the formal program.

Other highlights of the program included the Annual Moot Court competition won by the team of the School of Law, University of California at Berkeley, and the Annual Press-Bar Award. The award of $500 went to reporter Tom Cameron, of Los Angeles, for a series of articles on the administration of justice in California. Other reporters received Awards of Merit and Honorable Mention.

The Annual Meeting was presided over by Edwin A. Heafey, of Oakland, California, President of the State Bar, whose term of office expired at the conclusion of the Annual Meeting. He was succeeded by Graham L. Sterling, Jr., of Los Angeles. The other officers of the State Bar who assumed their new duties along with Mr. Sterling were Vice Presidents George Bouchard, of Los Angeles; Frank J. Creede, of San Francisco; Jerome R. Lewis, of Sacramento; and Vice President and Treasurer Robert Collins, of Richmond.

Clarence O. Woolsey

The Missouri Bar held its 1958 Annual Meeting in the Sheraton-Jefferson Hotel, St. Louis, on September 24-27. Over 1100 lawyers and their wives attended. James T. Blair, Governor of Missouri and a past President of the Missouri Bar Association, and Mayor Raymond R. Tucker, of St. Louis, welcomed the lawyers to the meeting.

A Trial Practice Institute held the attention of over 450 lawyers for one full day. On the same day, a Labor Law Institute attracted over one hundred lawyers representing both labor and management.

The first ceremony honoring lawyers admitted to the Bar of Missouri fifty or more years or who have reached the age of 75 was held during the meeting. Over 400 lawyers were given the honorary title of Senior Counsellor at a breakfast at which President Harry Gershenson presided and Former Senator Forrest C. Donnell, of St. Louis, responded on behalf of the class of Senior Counsellors.

Ross L. Malone, of Roswell, New Mexico, President of the American Bar Association, addressed those attending the Annual Meeting.

Henry R. Luce, editor and publisher of *Life*, *Time*, and *Fortune* magazines, was the principal speaker at the Annual Dinner.

At the last session there was a debate on Canon 35 at which Richard P. Tinkham, of Hammond, Indiana, and Robert D. Swezey, of New Orleans, were the principal speakers. A panel discussion by representatives of the press, radio, photographers, and the Bar followed.

At the adjournment of the Annual Meeting, the new officers took office. Clarence O. Woolsey, of Springfield, was elected President; Ilus W. Davis, of Kansas City, was elected Vice President; and Fred A. Eppenberger, of St. Louis, was elected Secretary. Marion Spicer, of Jefferson City, Clerk of the Supreme Court, is Treasurer *ex officio*.

The Wives of Missouri Lawyers held their second meeting at the time of the Annual Meeting. About 125 were in attendance. A hospitality suite for the ladies was maintained throughout the meeting. A tour of historical sites in St. Louis, a luncheon and program, and a continental breakfast provided the ladies excellent entertainment.

Two important actions by the Vermont Bar Association at its 1958 Annual Meeting, September 19-20, were the adoption of recommendations for sweeping changes in the state's courts by statutory and constitutional revisions and the adoption of a lawyers' indemnity plan. The Vermont

Bar Association thus established itself as the first in the nation to adopt this plan with the Oregon State Bar's adoption of a similar plan following at its annual meeting, September 24-27.

The Association members voted, with only one dissent to approve revisions calling for a judge of probate to be a member of the Bar of Vermont, to be replaced, if his office becomes vacant, by a registrar (if he is a member of the Bar) or by a superior or municipal judge, as designated by the chief superior judge. The proposed revisions include one that a judge of probate be prohibited from preparing petitions and legal documents or rendering legal services for any party in a matter pending in the court where he presides. Constitutional changes were also endorsed requiring gubernatorial appointment of Superior and Supreme Court judges and appointment of these judges from a list of qualified candidates presented by a commission of four members of the Bar and three laymen. The appointments would have to be approved by a two-thirds vote of the Senate. The judgeships would have a six-year term at the end of which the appointment would again come up for approval by a simple majority of the General Assembly.

Speakers at the meeting included Judge Learned Hand and Whitney North Seymour, both of New York City; Wesley Sturges, former dean of the Yale Law School; Chief Justice Walter C. Cleary of the Vermont Supreme Court; and Chief Judge Charles E. Clark, of the United States Court of Appeals for the Second Circuit.

Elected to office for the coming year are Leon D. Latham, Jr., of Burlington, President; Clifton C. Parker, of Morrisville, A. Luke Crispe, of Brattleboro, and Charles F. Ryan, of Rutland, Vice Presidents; and Lawrence J. Turgeon, of Middlesex, Secretary, Treasurer and Librarian. John D. Carbine, of Rutland, is Association Delegate to the House of Delegates of the American Bar Association.

Books for Lawyers

(Continued from page 72)

able tendency to override the variations of time, place, and purpose", and that therefore "prisons are apt to present a common social structure".[6] He also states that "the similarity of the New Jersey State Prison to the other institutions—in terms of social structure—is far more outstanding than the dissimiliarity".[7] It is this intrinsic applicability to the modern prison system in general which conveys to his study a much greater interest than it would have if the sociological conclusions reached by him were limited in their applicability to the particular institution that served him as an object lesson.

The book is not written from a human interest approach, but in a purely scholarly manner. Professor Sykes visualizes the prison as "a society within a society",[8] a society consisting of the prisoners in relation to each other as well as to the custodians, a totalitarian enclosure within an over-all democratic society. According to him "the maximum security prison represents a social system in which an attempt is made to create and maintain total or almost total social control".[9] And he believes that "the student of human behavior can find many theoretical issues suddenly illuminated by examining this small-scale society where numerous features of the free community have been drastically changed".[10] Such an examination he undertakes in a penetrating way, enabling him to reach most interesting sociological generalizations. It is conspicuous, however, that except for a passing reference to "the transfer of duties into the hands of trusted inmates",[11] he does not cover the system of "trustees" or supervising prisoners which is a general feature of custodial institutions.

It cannot be the purpose of this review to go into the numerous interesting observations and theories contained in the book. It may be mentioned, however, that the sexual aspect of life in a prison community and the danger of prisoner to prisoner inherent in such a society are described and analyzed by the author in a highly illuminating way. It may also be mentioned that according to Professor Sykes' provocative, but in this writer's view not persuasive analysis, riots in prisons are not events due to particular reasons causing the particular disturbances, but are a logical and unavoidable consequence of what he calls "crisis and equilibrium"[12] in a prison, constructing with regard to prison riots a theory similar to the well-known theory of business cycles of the economists. And the chapter dealing with the prison slang and its sociological function [13] may be singled out as that part of the book which comes closest to human interest approach.

What Professor Sykes presents in his small, but thoughtful sociological monograph, though not strictly legal stuff, is worthwhile reading not only for political scientists, but for lawyers too, especially because of its relation to the field of criminology.

MAXIMILIAN KOESSLER

San Francisco, California

(Continued on page 103)

6. *Ibid.*
7. Page xviii.
8. Page xii.
9. Page xiv.
10. *Ibid.*
11. Page 61.
12. Pages 109-129.
13. Pages 84-108, entitled "Argot Roles".

Activities of Sections and Committees

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The Section's Committee on Federal Regulation of Securities, under the chairmanship this year of Arthur H. Dean, of New York City, has created a number of subcommittees with responsibilities for specific areas of the law: (1) Securities Act of 1933 (Allen E. Throop, New York City, and Edward M. Bullard, Chicago); (2) Securities Exchange Act of 1934 (Ralph H. Demmler, Pittsburgh, and Louis Loss, Cambridge, Massachusetts); (3) Public Utility Holding Company Act of 1935 (Roswell L. Gilpatric, New York City, and Helmer R. Johnson, New York City); (4) Investment Company Act of 1940 and the Investment Advisers Act (Samuel L. Gwin, Boston, and H. Orvel Sebring, Jr., Philadelphia); and (5) Federal Power Act and Natural Gas Act (John Mulford, Philadelphia, and Edward F. McCabe, New York City). To assist Section members in keeping up to date on developments, the committee will use *The Business Lawyer* on a current basis and will summarize the developments of the year in the July issue.

The committee is making every effort to co-operate with the respective federal agencies in solving difficult securities law problems, whether by way of legislation or amendments to rules. A real service can be rendered to such agencies particularly in calling attention to practical aspects of proposals for changes. For example, the committee has submitted to the Securities and Exchange Commission extensive comments on the proposal to amend Rule 133 and has advised the Commission of the committee's readiness to be of any further assistance on any proposal which the Commission may desire. Members of the Section who wish to receive copies of comments on proposals by regulatory agencies may obtain them on request from Arthur H. Dean, 48 Wall Street, New York 5, N. Y., the Chairman of the Committee.

The Section's Committee on Commercial Laws also has adopted the subcommittee method of procedure and has organized the following subcommittees: (1) sales of personal property; (2) negotiable instruments; (3) investment securities; (4) documents of title; (5) trust receipts; (6) conditional sales contracts and chattel mortgages; (7) factors liens and accounts receivable; (8) interest and usury laws; (9) relative priority of liens; and (10) the proposed uniform act relating to validity of corporate guarantees. Inquiries about the committee's work should be directed to George R. Richter, Jr., Chairman, 458 S. Spring Street, Los Angeles 13, California.

The Banking Committee, under the chairmanship of Carl Funk, of Philadelphia, has reviewed the Report of the Special Committee of the American Bar Association on Federal Liens and has made suggestions and recommendations to that committee. The Report covers a wide field and contains proposals for legislation of the utmost importance to banks. The Committee on Federal Liens intends to present a final report to the House of Delegates at its mid-year meeting and it is anticipated that this will be circulated among the members of the Banking Committee as soon as it is available so that the committee can consider it and recommend to the Section Council the position the Section Delegate should take when the report is presented to the House of Delegates.

During the last session of Congress, the Banking Committee studied the proposed Financial Institutions Act of 1957, which was passed by the Senate but which the House of Representatives did not act upon. It seems probable that similar legislation will be introduced in the 86th Congress either in the form of another comprehensive bill or separate bills covering portions of the material which had been included in the Financial Institutions Act. The Committee intends to review all legislation of this type which may be introduced, and to recommend to the Section any action which it feels should be requested of the House of Delegates concerning such proposals.

The interest of the Committee on State Regulation of Securities continues to center around the Uniform Securities Act, particularly as this is a legislative year in many states. Since the report, which appears in the July, 1958, issue of *The Business Lawyer* (page 609), work has been actively going forward in several states. At the request of the Alaska Legislative Council, Louis Loss, the Chairman of the Committee, went to Kodiak, Alaska, in October to testify on the Act, and it may be introduced in the first session of the new state's legislature. Persons who have current information concerning the status of the Act in particular states are urged to communicate with the Chairman of the Committee, Harvard Law School, Cambridge 38, Massachusetts.

The Committee on Corporate Laws, under the chairmanship of Leonard D. Adkins, of New York, plans to devote the major part of its time this year to the annotation of the Model Business Corporation Act. The annotations are being prepared in co-operation with the American Bar Foundation. The Project Director at the American Bar Center is James F. Spoerri who, with his staff, prepare draft annotations which are then assigned by Mr. Adkins to two members of the committee for study and revision. Thereafter the annotations as so revised are reviewed by an editorial committee consisting of three members of the committee and finally are considered by the full committee at one of its frequent meetings.

The committee is considering also

certain amendments to the Model Business Corporation Act and is giving as much assistance as it can to those interested in studying major revisions of the corporation laws of the various states. The Model Business Corporation Act has now been used as the basis for the new corporation laws of Wisconsin (1951), Oregon (1953), District of Columbia (1956), Texas (1955), Virginia (1956), North Dakota (1957), Alaska (1957) and Colorado (1958). Other states such as Maryland (1950) and North Carolina (1955) have used portions of it.

Under the chairmanship of Hubert D. Johnson, of Dallas, Texas, the Section's Committee on Liaison with State and Local Bar Associations has prepared a comprehensive survey summarizing the current activities of state and local bar associations in corporation, banking and business law. The committee learned about many projects for revision of state laws. Copies of the report have been circulated to all of the committee chairmen of the Section. It is possible that others may also desire to review the report. Copies may be obtained upon request from Mr. Johnson, Mercantile Bank Building, Dallas 1, Texas.

The Section's Division of Food, Drug and Cosmetic Law, of which Charles Wesley Dunn, of New York, is Chairman, is considering the impact of the Food Additives Amendment of 1958 which creates new basic questions of compliance and administration. Seminars and conferences have been organized for the discussion of these problems. The Division's Committee on Chemicals, of which Charles S. Maddock, of Wilmington, Delaware, is Chairman, is planning to give particular consideration this year to legislation relating to household chemicals. During recent years several state legislatures have passed and others have indicated an interest in legislation in that field. Also, bills have been introduced in Congress. The Committee is of the opinion that the most desirable outcome would be uniform legislation at the state level. It therefore intends to determine whether such an approach might have general acceptance. If so, the proposal will be submitted for consideration of the Commisioners on Uniform State Laws.

Ben MacKinnon

SECTION OF JUDICIAL ADMINISTRATION

Chief Judge Emory H. Niles, of Baltimore, Chairman of the Section of Judicial Administration, has announced the appointment of Mr. F. Benjamin MacKinnon as Administrative Assistant of the Section. This new position was created to enable the work of the Section, now to a large extent scattered, to be organized and concentrated into a more effective means of attaining the Section's objectives by the development of a continuing and harmonious program.

Mr. MacKinnon is a member of the Massachusetts Bar, a graduate of Harvard Law School in 1948, where he was a teaching fellow and research associate before coming to the American Bar Foundation in 1955. At the Foundation he was Deputy Administrator and Project Director of the Study of the Cannons of Ethics. He has had long and close contacts with the American Bar Association and its varied activities.

Mr. MacKinnon's primary day-to-day responsibility will be to assist the work of the state committees in his capacity as Director of State Activities. The state committees have been for many years the primary mechanism by which programs formulated and adopted by the Section have been translated into action. It is hoped that the appointment of a full-time Director with an office in the American Bar Center will provide the state committees with effective assistance in their difficult but extremely important task; bringing closer the day when all courts meet minimum standards of judicial administration and making recommendations for further progress as other means of improvement of judicial administration are developed.

The new Section office will provide a permanent location for the records of the Section at the Bar Center and a centralized source of information for its officers, committees and members. It should also make possible better cooperation between the Section and other Sections and Committees of the Association concerned with programs for improving the administration of justice.

All members of the Section are invited to communicate with Mr. MacKinnon on matters relating to Section affairs and on matters in which the Section may be useful to them in connection with their own problems relating to judicial administration.

SECTION OF LABOR RELATIONS LAW

The Section of Labor Relations Law brought to a close a most active and fruitful year under the chairmanship of Gerard D. Reilly at the Association's Annual Meeting in Los Angeles.

During the past year, the Section again made a significant contribution to the field of legal scholarship in labor-management relations with the publication and distribution of the Section's *Proceedings* for the prior year. The proceedings include, among other things, all of the reports and papers delivered at the preceding meeting of the Section. The increasing demand for copies of the *Proceedings* indicates the importance placed upon them by practitioners, administrators and students in the field. It is expected that this year's *Proceedings* will be published soon after the first of the year.

The Section meetings at Los Angeles, held in conjunction with the Association's Annual Meeting, were extremely well attended by lawyers from all parts of the country. Among the significant reports made to the Section and acted upon was a report from the Committee on Arbitration. This committee reported upon the developments in the field of arbitration with particular emphasis upon litigation involving arbitration in the federal courts. A report of equal

interest and significance was that of the Committee on State Legislation. This scholarly survey of developments in the field of labor law among the several states should prove helpful to the practitioners in the field.

One of the more significant reports which the Section received and acted upon was that of the Committee on National Labor Relations Board Practice and Procedures. This Committee advanced several recommendations for the improvement of National Labor Relations Board procedures, all of which were adopted by the Section and approved by the House of Delegates.

The Section also heard two excellent papers, one by its Secretary, Archibald Cox, Royall Professor at the Harvard Law School, and Phillip R. Rodgers, a member of the National Labor Relations Board. Professor Cox addressed the Section with reference to the significance and implications of the Supreme Court decisions in the field of labor relations during the 1957-58 term of the Court. Board Member Rodgers addressed several hundred members of the Section at its annual luncheon concerning the impact upon Board procedures and handling of cases of the Board's increased case load. The foregoing reports and papers, as well as several other reports of Section Committees, will be printed in the forthcoming Section *Proceedings*.

One of the most provocative sessions was that given over to a debate on the Kennedy-Ives Bill, the legislative proposals advanced at the last session of the Congress for the internal regulation and control of labor unions. These proposals were explained to the Section by Professor Cox and debated by Council Member Louis Sherman, of Washington, D. C., and outgoing Section Delegate Theodore R. Iserman, of New York City. Mr. Sherman spoke in favor of the Kennedy-Ives proposals, Mr. Iserman in opposition. Although there was extensive discussion on this subject, no vote was taken.

The Section also conducted a very successful workshop at the Northeast Regional Meeting at Portland, Maine, in October. Participating in the workshop were William J. Isaacson, of New York City, Professor Cox, John W. Morgan and Robert M. Segal, of Boston, Gerard D. Reilly, of Washington, D. C., and Alfred Kamin, of Chicago, Illinois.

The newly elected officers of the Section are William J. Isaacson, Chairman, and John W. Morgan, Vice Chairman. Professor Archibald Cox was re-elected Secretary. A newly elected member of the Council is Frank A. Constangy, of Atlanta, Georgia. Thurlow B. Smooth, of Cleveland, Ohio, was re-elected a member of the Council. Continuing to serve as members of the Council are Morris P. Glushien and John H. Morse, of New York City, Tracy H. Ferguson, of Syracuse, New York, Marion B. Plant, of San Francisco, California, Louis Sherman, of Washington, D. C., and Edwin Pearce, of Atlanta, Georgia. Alfred Kamin, of Chicago, Illinois, was elected Section Delegate.

SECTION OF MINERAL AND NATURAL RESOURCES LAW

The Section of Mineral and Natural Resources Law reconsidered its decision to participate in the Pittsburgh Regional Meeting March 11, 12 and 13, and has decided to forgo the presentation of a formal program. However, plans are under consideration for attracting attendance at the Regional Meeting by Section members.

Chairman Robert E. Lee Hall has announced that there will be a meeting of Section officers, Council members and Committee Chairmen on the occasion of the Midyear Meeting of the Association in Chicago. This Section meeting has been scheduled in the Sheridan Room of the Edgewater Beach Hotel, commencing at 10:00 A.M. on Sunday, February 22. Lunch has been scheduled in the same room, beginning at 12:30 P.M., and wives have been extended an invitation to the luncheon. At the business meeting there will be a number of policy matters considered and plans for the program at the Annual Meeting in Miami Beach August 24-28 will be formulated. A special committee will be appointed for the specific purpose of recommending a program of social events during the Annual Meeting.

Meanwhile, John P. Akolt, of Denver, President of the Rocky Mountain Mineral Law Foundation, has announced the appointment of Section Chairman Robert E. Lee Hall as a Trustee of the Foundation. The organization is comprised of member associations from the eight Rocky Mountain states, and includes state universities, mining associations and western schools of law. Among other trustees of the Foundation are: Dean Edward C. King, University of Colorado; Judge Clay V. Spear, Idaho Bar Association; Robert Palmer, Executive Vice President, Colorado Mining Association; Thomas J. Files, Rocky Mountain Oil and Gas Association; R. Lauren Moran, Wyoming Mining Association; and Ernest Fleck, North Dakota Oil and Gas Association. The Foundation was organized to stimulate legal research in mineral law, to hold legal institutes, to conduct research activities relating thereto, and to establish scholarships and fellowships in the field.

SECTION OF MUNICIPAL LAW

Plans are under way for the annual Section meeting in Miami in August. The Beau Rivage Hotel in the Bar Harbour area of Miami Beach has been selected as Section headquarters. Giles J. Patterson, of Jacksonville, Florida, will be chairman of the meeting and will be assisted by Huger Sinkler, of Charleston, South Carolina, and a committee of Florida lawyers. A three-day meeting is planned, commencing on Sunday, August 23.

A committee headed by Sidney Ruffin, of Pittsburgh, is planning a Section meeting in connection with the regional meeting at Pittsburgh on March 11 to 13. Tentative plans are for a seminar discussion on rehabilitation with special emphasis on the help that is available from the Federal Government.

Plans are not so well formulated for a Section meeting at Memphis in the fall of 1959, but a program is being prepared and a chairman will be announced shortly.

The Section Chairman received applications from some two hundred and fifty members to serve on the various Section committees and the committees have been appointed. The large response by the members would indicate that the committee reports are going to be of more than usual interest this year.

SECTION OF FAMILY LAW

At a meeting held in Washington, D. C., on Saturday, November 15, 1958, the officers of the Section of Family Law unanimously appointed the following Committee Chairmen: Adoption—Philip Adams, San Francisco, California; Custody—Carl F. Ingraham, Birmingham, Michigan; Judges—Their Role in Domestic Relations—Judge Carl E. Wahlstrom, Worcester, Massachusetts; Juvenile Law and Procedure—Judge Gustav L. Schramm, Pittsburgh, Pennsylvania; Marriage Law—Morris Ploscowe, New York, New York; Matrimonial Actions—Clarence Kolwyck, Chattanooga, Tennessee; Membership—William M. Wherry, New York, New York; Paternity—Fred T. Hanson, McCook, Nebraska; The Practicing Lawyer—Aaron L. Tilton, Milwaukee, Wisconsin; Public Relations—Jacob T. Zukerman, New York, New York; Support—John Alexander, Washington, D. C.

The above list completes the appointment of Committee Chairmen in the Section of Family Law. Judge Schramm, of the Juvenile Law and Procedure Committee, as well as Mr. Kolwyck, Chairman of the Matrimonial Actions Committee, and Fred T. Hanson of the Paternity Committee, and John Alexander of the Support Committee, were all appointed to their respective posts at the Annual Meeting in Los Angeles.

Space Law

(Continued from page 57)

ICAO already has more legal problems to care for than it can handle—including the development of acceptable doctrines to facilitate such touchy matters as the status of airspace over territorial waters, the use of airways above international zones, and the regulation of international airlanes in the light of the coming commercial jet age.[26]

In all probability, therefore, a new specialized agency would have to be created, preferably from some existing organization.

To me, the logical candidate is the International Astronautical Federation, an experienced non-governmental group composed of respected scientific societies from twenty-five nations, including the contemporary leaders in the space arena, the United States and the Soviet Union.

While there may be good reasons for the I.A.F. to remain independent of the United Nations or any other authoritative organization, and while the traditional emphasis of the Federation is on science rather than law—I submit that no effective beginning toward a space code is possible without recourse to the kind of technical knowledge contained within the I.A.F. membership. If the I.A.F. can be persuaded to set up a permanent headquarters and establish a permanent legal division to study the embryonic regulatory problems of space, it could well serve as the initial instrument to carry forward this vital task.

It might thus formulate plans for working out the draft of a space code to be submitted eventually to a *World Conference on the Use of Outer Space*—possibly a conference held here at The Hague within a year or two.

There is no suggestion here as to the form such a draft should take. It might be a set of agreed-upon positive rules. It might be a covenant of things-not-to-be-done. It might seek to establish an international space organization to regulate the more distant phases of space exploration, such as advanced lunar or interplanetary probes or investigations which generally transcend national interests. Any number of possibilities exist.

None of this is intended to imply that a beginning toward a space code will be easy to draft, easy to accept, or immediately possible to enforce.

Such facets of the problem, important as they are, do not really figure in the point with which I am most concerned. The point, in summary is this:

If some effort toward a space code is begun—an effort which merits international recognition and which, by association with the most powerful legalized international institution in the world, can be assured of global consideration at the proper time—then we shall have created an attitude, a precedent, an expression of belief in the need to prevent anarchy in space which may crystallize eventually into effective law.

Equally important, as Michael Aaronson recently observed,[27] mere recommendations of this nature can result in "international and consequential national controls" in highly important allied fields. In other words, the essence of a suggested space code, whether or not adopted in itself, may spill over into other areas of international law and thus exert an influence for lasting peace.

On the other hand, if we attempt nothing in this direction the tempo of our age may force us into sudden desperate situations. In all probability this will be the precise result of indefinite indolence or of a wait-and-see policy toward regulating space behavior. At best we are likely to fall into the ways so aptly described by a contemporary English editorial on space law:

> One conclusion is that these problems will provide international jurists with years of detailed study and, such being the case, the big powers can ignore the whole thing until it is time to appoint another commission to amend the laws of the last, which were, of course, so out-of-date as to be inapplicable. . . . *The giddy cycle of law chasing power but never quite catching up will thus be perpetuated.*[28]

Perhaps I am rushing things with these recommendations, stretching possibilities too far, too fast. Many informed and intelligent people, I am sure, will think so.

But I incline toward the philosophy of the fellow who remarked: "When you reach for the stars, you may not quite get one; but you won't come up with a handful of mud, either."

26. HARVARD LAW RECORD, April 10, 1958, page 2.
27. *Space Law*, INTERNATIONAL RELATIONS, April, 1958, page 426.
28. 101 SOLICITOR'S JOURNAL 965.

OUR YOUNGER LAWYERS

Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Committee on Legislation

The Junior Bar Conference has created a Committee on Legislation to work hand in hand with the American Bar Association's Special Committee on Federal Legislation. This latter group, under the Chairmanship of former Senator Robert W. Upton, of New Hampshire, is designed to create more interest on the local level in the Association's legislative proposals and has advisory members in each state to aid in co-ordination with local bar groups.

Heading the Junior Bar Legislative Committee is Walter Franklin Sheble, of Washington, D. C., who labored in 1958 for the Conference on behalf of H.R. 9 and 10. Other District of Columbia members of the Committee are Edwin P. Schneider, Vice Chairman; Elizabeth Elward, Secretary; John E. Nolan, Jr.; Charles G. Williamson; and Theodore S. L. Perlman.

Junior Bar Role

The Junior Bar Conference has designated Committee Vice Chairmen in various regional areas as well as committee members representing each state. The job of these Junior Bar representatives will be to work with the advisory committee members to gain favorable congressional action on federal legislation of general interest to lawyers, such as:

The Keogh Bill (as reintroduced), which eliminates discrimination against professional people by permitting them to postpone taxes on a limited amount of their incomes earmarked for a retirement savings plan similar to those available to employees of private corporations; legislation to relieve court congestion (additional judgeships bill, etc.); and proposals for the improvement of practices and procedures before federal administrative agencies.

Maine Conference

A Conference on National Legislation was held during the recent Portland, Maine, Regional Meeting. Its aim was to familiarize state and local bar officials, as well as Junior Bar leaders, with the Association's legislative program and to give them an opportunity to comment or ask questions about this program. The Maine conference was so successful that it is expected that a similar session will be held during the Pittsburgh Regional Meeting in March.

The American Bar Association has come to rely on the very energetic help of its younger lawyers. Hence, their interest and active assistance is most essential if the Association's legislative program is to succeed in the 86th Congress.

For further information about the Association's legislative program, write its Washington Office at 1025 Connecticut Avenue N.W., Washington 6, D. C. For the benefit of those Association members especially interested in its federal legislative program, Donald E. Channell, Director of the Washington Office, writes an informative "Washington Letter".

Unauthorized Practice of Law News

In view of the active and continuing interest of the younger lawyers in combating the unauthorized practice of law, we call your attention to *The Unauthorized Practice News,* published quarterly by the Association's Committee on Unauthorized Practice of Law. It is well worth the price of $1.50 per year.

Also, may we remind you of the series of nine articles on various aspects of this problem in the Conference's publication *The Young Lawyer.* This series, dealing with various aspects of unauthorized practice of law, contains hints from Bar leaders in the field, together with case references. Copies are available on request to *The Young Lawyer* at P.O. Box 7783, Washington 4, D. C.

Members of the Legislative Committee at a recent meeting. Standing (left to right) are Edwin R. Schneider, Jr., John E. Nolan, Jr., Charles G. Williamson and Chairman Walter Franklin Sheble. Seated is Elizabeth Elward. All live in the Washington, D. C., area.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

ANTITRUST: The *pièce de résistance* of antitrust literature year by year is the annual survey by Professor Milton Handler of Columbia Law School. For reasons known only to him, his organization of the cases and clarity of expression have no equal. Without much doubt, antitrust cases are not only of ponderous length but, assuming the reader can keep awake long enough to read one, turning then to another is many times a human impossibility. This makes analysis of a group of cases a difficult feat, and it is in this rare art that Milton Handler excels. Moreover, the startling thing is that each year his annual survey is better than last year. In a field where simple, understanding writing is a rarity, Milton Handler's annual survey is manna from heaven. It is published as usual in the October, 1958, issue of *The Record* of The Association of the Bar of the City of New York (Volume 13, No. 7, pages 417-460; address: 42 West 44th St., New York 46, N. Y.; no price stated).

Professor Handler divides this year's paper into three parts. Part I deals with the Rule of Reason, and, as you would expect, discusses whether *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 594, overrules *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594. Both were Sherman 1 cases involving tie-ins. In *Times-Picayune*, the tie-in approved compelled advertisers to buy ads in both the morning and evening editions of the *Times-Picayune*. In *Northern Pacific Railway*, the tie-in condemned required vendees and lessees of its land to ship on its line all commodities produced or manufactured on the land, provided a competing railroad did not offer a lower price or better service. Along with these cases, Professor Handler discusses the very important opinion of Judge Stanley Barnes at the Ninth Circuit in *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 255 F. 2d 214, which the Supreme Court has taken on certiorari, 26 U. S. Law Week 3354 and 27 U. S. Law Week 3110. There, the complaint was dismissed because no public injury was shown. In this, the case bears marked similarity to *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 *affirmed* 239 F. 2d 176 (4th Cir.), *certiorari denied*, 355 U. S. 823; *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Circuit), *certiorari denied*, 355 U. S. 822 and 357 U. S. 923; and *Paramount Film Distributing Corp.* v. *Village Theatre*, 228 F. 2d 721 (10th Cir.). These are the three cases that Professor Handler discussed so interestingly last year. He reports that the *Village Theatre* case was settled on the eve of a fourth trial, so the saga is ended.

The second part of the paper is divided into three sections, A, B and C. In the A division, there is a very informative discussion of Federal Trade Commission merger litigation under Section 7 of the Clayton Act. Crown Zellerbach's attempt to acquire St. Helen's (F.T.C. Docket 6180), and Brillo's attempt to acquire Williams (F.T.C. Docket 6557) are the principal cases analyzed. In the opinion of Professor Handler "The teaching of Pillsbury (F.T.C. Docket 6000) has received full and complete reaffrmation" by the Federal Trade Commission as exemplified in the Commission's *Crown Zellerbach* and *Brillo* opinions. The pundit is very happy because he believes qualitative has replaced quantitative substantiality.

In Division B, there is an interesting discussion of new merger cases filed by the Department of Justice and the F.T.C. These are: the acquisition by Lucky Lager of the Fisher Brewing Company of Utah (it seems Fisher sells "virtually all its beer" in Utah and has 39 per cent of the market, whereas Lucky Lager is the twelfth largest beer seller in the United States, the largest seller in the West and has 12 per cent of the Utah market); the acquisition by Reynolds Metals of Arrow Brands, Inc. (it seems Arrow is one of eight companies that sell decorative aluminum foil to florists and purchased all its requirements from Reynolds); and the acquisition of Gentry, Inc., by Consolidated Foods Corporation (Gentry makes dried food seasonings, including onions, garlic, chili pepper and paprika and the Commission believes Consolidated may coerce its food suppliers to purchase dried food seasonings from Gentry).

In Division C, there is a discussion of the form of relief that will be granted in merger cases under the Celler-Kefauver amendments to Section 7. Attention is called to the *International Paper* decree (F.T.C. Docket 6676), where 40 per cent of a new mill's production was to be made available for ten years to non-integrated purchasers and the *General Shoe* decree wherein it was ordered (1956 Trade Cases, par. 68,271 at page 71, 230, M.D. Tenn.) to purchase 20 per cent of its retail requirements from other shoe manufacturers for a period of five years. These decrees indicate that both the Department of Justice and the Federal Trade Commission recognize "that the antimerger law can be fairly and effectively enforced without total divestiture" (page 449).

Professor Handler devotes the last and third section of his 1958 review to the year's crop of Robinson-Patman Act cases. The *Nashville*, 355 U. S. 373, and *Safeway*, 355 U. S. 389, cases, decided five to four at the October, 1957, Term and deciding that Section 3 of the Robinson-Patman Act is a criminal statute only and not an "antitrust law" carrying civil remedies, are

considered. *Standard of Indiana*, 340 U. S. 231 and 355 U. S. 396, is also discussed in the light of H.R. 11 and S. 11. Professor Handler predicts "the proposed legislation" will pick up "momentum again" with the reassertion by the Supreme Court that good faith is a defense under Section 2 of Clayton.

A splendid presentation of the year's developments. Reading it, as always, gives you a greater insight into antitrust problems. The Antitrust Bar is deeply in Professor Handler's debt.

MR. DOOLEY: This Department has been in receipt of some interesting Dooley items since the publication in the June issue of the piece by James Marsh and in the October issue of the piece with respect to the two grand books of Elmer Ellis, the anthology *Mr. Dooley at His Best*, published in 1938 by Scribner's, and the life of Finley Peter Dunne, published in 1941 by Knopf. Elmer Ellis, long a Professor of History at the University of Missouri in Columbia, is now President of that fine University. Professor Fratcher of the Missouri Law School called his attention to the October column. As you might expect, Boston has a Dooley cell, but not where you would think. Edward J. Bander, Law Librarian in charge of the Library of the United States Court of Appeals for the First Circuit, writes that he keeps "a record of every text book or article in which he [Dr. Dooley] is quoted", that he has "a list of his comments on the law" and "also a list of all his essays that would be entertaining to a lawyer".

In *Case and Comment* for September-October, 1957 (Vol. 62, No. 5, pages 20-23) Mr. Bander has a most interesting piece. It reveals that one of Mr. Dooley's great claims to fame is his frequent quotation by great scholars. President Ellis tells us that he became interested in Dooley from quoting him to his history class. Bander tells us that Dean Roscoe Pound and Professor Edwin J. Corwin did the same thing.

Bander has a "Dooley Dictionary" that in part reads like this:

Appeal—An appeal, Hinnissy, is where ye ask wan coort to show its contempt f'r another coort.

Art of Advocacy—If a lawyer thinks his client is innocent he talks to th' jury about th' crime. But if he knows where th' pris'ner hid th' plunder, he unfurls th' flag, throws out a few remarks about th' flowers an' th' bur-rds, an' asks th' twelve good men an' thrue not to break up a happy Christmas, but to sind this man home to his wife an' childher, an' Gawd will bless thim if they ar're iver caught in th' same perdicymint.

Clear and Present Danger—I'm sthrong f'r anny rivolution that ain't goin to happen in me day.

Constitutional Interpretation—. . . th' constitootion iv th' United States is applicable on'y in such cases as it is applied to on account iv its applicability.

De Minimis Curat Lex—"Niver steal a dure-mat," said Mr. Dooley. "If ye do, ye'll be invistigated, hanged, an' maybe rayformed. Steal a bank, me boy, steal a bank."

Draftmanship—I want a law that mesilf an' all other good citizens can rayspict.

Equal Protection of the Law—. . . this home iv opporchunithy where ivry man is th' equal iv ivry other man befure th' law if he isn't careful.

Expert Testimony—Thank th' Lord, whin the case is all over, the jury'll pitch th' tistimony out iv th' window an' consider three questions: Did Lootgert look as though he'd kill his wife? Did his wife look as though she ought to be kilt? Isn't it time we wint to supper?

Hohfeld System—We have th' right to be sued f'r debt instead iv lettin' th' bill run, which is a priv'lege. We have th' right to thrile by a jury iv our peers, a right to pay taxes an' a right to wurruk. None iv these things is anny good to me.

Jury—In due time twelve men iv intilligenc who have r-read th' pa-apers an' can't remimber what they've r-read, or who can't r'read, or ar-re out iv wurruk, ar-re injooced to sarve, an' th' awful wheels iv justice begins to go round.

Marriage Laws—In me heart I think if people marry it ought to be f'r life. Th' laws ar-re altogether too lenient with thim.

Precedents—Be hivins, Hinnissy. I want me advice up-to-date, an' whin Mack [President McKinley] an' Willum Jennings tells me what George Wash'nton and Thomas Jefferson said, I says to thim: Gintlemen, they larned their thrade befure th' days iv open plumbin. Tell us what is wanted ye'ersilf or call in a journeyman who's wurrukin' card is dated this cinchry.

Presumptions—In England a man is presoomed to be innocent till he's proved guilty an' they take it f'r granted he's guilty. In this counthry a man is presoomed to be guilty ontil he's proved guilty an' afther that he's presoomed to be innocent.

Probate Court—"Mr. Dooley's gibe that it is the function of the probate court to see to it that every member of the bar gets a fair chance at what the deceased could not take with him."

Public Policy—A Mormon, Hinnissy, is a man that has th' bad taste an' the' rellijion to do what a good many other men ar're restrained fr'm doin' be conscientious scruples an' the' polis.

Copies of this *Case and Comment* piece can be obtained free from The Lawyers' Co-operative Publishing Company, Rochester, New York, or the Bancroft-Whitney Company at San Francisco, California.

PATENTS: Federally-employed scientists and technicians desiring to develop patentable products or processes have, in recent years, found their interests in resulting patents severely impaired by the much-discussed Executive Order 10096. This directive, issued by President Truman, purports to give the Government full title to inventions developed by Government employees during working hours, through Government contributions of equipment or service, or in relation to the official duties of the inventor. In an era marked by a desperate lack of trained technical presonnel, such a policy has been criticised as working considerable harm to the Government's contest with private concerns for scientific talent. The proposal of a more attractive and workable policy, in the form of legislation, is recommended in the comprehensive study, "Federal Employee Invention Rights — Time To Legislate", by Marcus B. Finnegan and Richard W. Pogue, appearing in *The Michigan Law Review* (Vol. 55, No. 7, May, 1957). Exhaustively reviewing judicial attitudes toward the inventor-governmental relation, the authors conclude that Executive Order 10096 is a "remarkable departure from the [case] law governing employee rights in in-

ventions". The authors make tentative recommendations for legislation dividing title rights between employee and Government. The proposed statute creates a general premise that title is in the inventor except in certain instances of substantial governmental contribution or direction, thereby revising the emphasis of the present 10096 policy, and it also provides for judicial review in case of decisions adverse to the employee. (Reprints may be obtained by writing The Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan. Price $.50 per reprint.)

RULE IN SHELLEY'S CASE: Poems are not only written by Professor Field of Harvard Law School about due process and the Plimsol Line. David Sinclair, Esq., of the Wilmington, North Carolina, Bar, sends me a poem that North Carolinian barristers recite to remember the Rule in *Shelley's* case. It goes:

Shelley was a man by no means a fool
Who went into Court and established a rule.
Then Mr. Shelley laid down and died
But the rule that he made has always applied.
For the words of Lord Coke
Can't be taken in joke
And Shepard Chief Justice in *Starnes* v. *Hill* (112 North Carolina page 1)
Said the rule of Lord Coke remains with us still. (and this is the rule)
When any ancestor by any gift or deed
Takes an estate with remainder to his seed
And in the remainder forgets the word "heir"
Such word must not mean to impair from intent or creation
Or as word of limitation
And the ancestor takes the estate in fee
As though he had taken by judicial decree.

TAXATION: Many a disinterested observer believes that the most important decisions at the October, 1957, Term of the Supreme Court of the United States were the four defense plant tax cases. Two involved real property taxes under Michigan's Public Act 189 by Muskegon on Continental Motors (355 U. S. 484) and by Detroit on Borg-Warner (355 U. S. 466). Borg-Warner had a lease for a term of years and under Public Law 364 its lessee's interest was subject to state taxation. Even though Continental Motors occupied under a mere permit, the Solicitor General conceded Public Law 364 was also applicable to it. His argument was that the tax could not in either case be measured by the full assessed or fee simple value—that the measure was the leasehold interest of the contractor. The other two cases (*Murray Corporation*, 355 U. S. 489, and *American Motors*, 80 N. W. 2d 363, *affirmed* 356 U. S. 21) involved taxes by Detroit and Kenosha on materials and work in process in the contractor's plant but owned by the United States under fixed price contracts. Unlike *Continental Motors* and *Borg-Warner*, the taxes in *Murray* and *American*, were imposed under ordinary straight *ad valorem* property tax statutes and not under a special privilege tax statute such as Michigan's Public Act 189.

At Coronado, California, before the National Association of Tax Administrators, Merritt H. Steger, of the San Antonio Bar, Deputy General Counsel of the Navy, read a paper discussing these four decisions that every lawyer for a defense contractor or taxing unit should have. You can obtain a copy free by writing the National Association of Tax Administrators at 1313 East 60th Street, Chicago 37, Illinois.

More recently, Mr. Steger's piece has been converted into a law review article and is being published in the December, 1958, issue of the *Catholic University Law Review* (Address: 1323 18th St., N.W., Washington 6, D. C.; price: $2.00). The law review article discusses developments since Mr. Steger spoke at Coronado. These have been considerable. After directing the cities of Detroit and Kenosha to answer the motion of the Solicitor General to rehear *Murray* and *American Motors*, on June 9, 1958 (26 U. S. Law Week 3357, the very day Mr. Steger spoke at Coronado), the Supreme Court denied the motion over a sharp dissent by Mr. Justice Frankfurter. In June, 1958, also, the Supreme Court of Texas decided *Phillips Chemical Company* v. *Dumas Independent School District of Moore County* (1 Texas Supreme Court Journal 497 and 2 Texas Supreme Court Journal 28, affirming, over four dissents, the Court of Civil Appeals; see 307 S.W. 2d 605). The probability is that certiorari will be asked in this Texas case, and it is definitely the one to watch at this writing. In October, 1958, the Supreme Court of California unanimously affirmed, in an opinion by Traynor, J., the decision of Judge Hunt in the Superior Court of Los Angeles County on March 22, 1957, in the *General Dynamics* and *Aerojet* cases. It is now clear that, despite *Murray* and *American Motors*, the possession of personal property is not taxable in California under a straight property tax statute. All these and other developments Mr. Steger discusses in his admirable law review article. Some idea of the significance of Mr. Steger's discussion can be gained from his report that in one form or another this type of tax is being levied in California, Connecticut, Florida, Indiana, Iowa, Michigan, Minnesota, Missouri, New Jersey, Tennessee, Texas and Wisconsin. In addition, Colorado, Massachusetts, New York and Ohio are considering its levy. Every day the list grows longer and if it keeps up, the estimate of the Solicitor General that the tax (if held valid) will increase the procurement costs of the Defense Department by over 300 million per year may come true.

The Conference of Chief Justices

(Continued from page 49)

people must not be crippled, curbed or destroyed. The Conference report would have none of this. It concludes, therefore, in most respectful and temperate terms, and with extreme restraint, to urge upon the Court, that, particularly in the field of determining federal and state powers and relationships, it exercise that greatest of all judicial powers, the power of judicial self-restraint, by constant recognition and giving effect to the vital difference between what, on the one hand, the Constitution prescribes or permits and that which, on the other, may, from time to time, to the majority of the Court, seem desirable or undesirable, and by adhering firmly to its tremendous, strictly judicial powers and eschewing so far as possible the exercise of essentially legislative powers, contenting itself with use of the policy-making role, where at all necessary, with only the utmost care and moderation. Such is the general tenor of the report, offered in a spirit of good will and co-operation in the public interest. If, perchance, it should come to the attention of the esteemed members of the Court, it is our fervent wish and hope that it will be received and considered in like fashion.

Mention has been made of the dread responsibility of members of Bench and Bar for enhancing the prestige of courts and the judicial process in public esteem and the consequent duty to criticize court decisions, if at all, with only the greatest restraint. That responsibility and that restraint must be deemed to apply not only to the critic but as well to the formulator of court opinions and the making of court decisions. We, lawyers and judges, share, as advocates, as critics and as final arbiters of right and law, one common responsibility to the people in that regard. If, in public appraisal, we do not make our system work, as an instrument for good and for human freedom, it must fail.

May I conclude by thanking our splendid and genial Chairman, Mr. Justice Clark, for the many courtesies extended to our Conference and its members, for his great contribution to our entertainment and enjoyment of the 1958 meeting, and, above all, for his patient understanding, as Chairman of this Section, of our problems, program and purpose.

My thanks and those of the Conference go to the American Bar Association, and the Section of Judicial Administration, for making our Conference a reality and its continued existence possible. We bespeak your understanding and support of our efforts and pledge the same to you in all your great endeavors furthering our common goal of improved administration of justice.

A Legal Error That Should Be Corrected

(Continued from page 30)

trial judge in Georgia or in any other state of the Union may conclude from other testimony, additional testimony of real experts, testimony matured in the light of developments since May 17, 1954, more complete testimony, that in our Georgia society, or Texas society, or the society of any other state, state-imposed segregation in education does not, of itself, result in Negro children receiving educational opportunities which are substantially inferior to those available to white children similarly situated, or that if it does, that the psychological effect on white children of the enforced mixing and mingling overbears the effect of segregation on Negro children.

And the Attorney General overlooks the fact, when he says, "the South must obey", that the Eleventh Amendment to the Constitution of the United States is still a part of that Constitution, and that federal court decrees can not compel any state of the Union to operate a public school system. Federal courts may, under existing decisions, enjoin the operation of segregated schools; they cannot compel the operation of integrated schools.

Even the opinion of May 17, 1954, recognizes that the Court was dealing with systems of public schools which the state had undertaken to provide,[23] not which the state was compelled to provide.

Not yet has the time come when a federal court decree can compel a state to provide a school, a college, a hospital or any other institution which a state does not choose to provide.

The Attorney General said: "When a court has entered a decree, the state has a solemn duty not to impede its execution." Surely the Attorney General did not mean that if a court should enter a decree compelling a state to maintain an integrated school that the state had a solemn duty to maintain that integrated school.

If he meant that, he has overlooked the Eleventh Amendment and an unbroken line of cases construing it and declaring the law of the land.[24]

If he did not mean that, what is it that the South must obey? Compliance with what "law of the land is inevitable"?

President Lincoln, in his First Inaugural Address, recognized that decisions of the Supreme Court were not the "law of the land".

Said he:

> At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this any assault upon the Court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[25]

They should not, however, decide cases not properly before them. When they do, it is their fault if others seek

23. 347 U.S. 493.
24. *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47; *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459.
25. ANNALS OF AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Volume 185, page 53.

to turn such decisions to political purposes.

The Court simply had no constitutional power to declare as the "law of the land" its edict in the 1955 opinion in *Brown* v. *Board of Education of Topeka, Kansas*: "These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. *All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle.*"[26]

The cases before the Court from Kansas, Delaware, South Carolina and Virginia[27] were decided May 17, 1954. Under the guise of considering "the manner in which relief is to be accorded", the Court sought to legislate with respect to all provisions of federal, state or local law which might be deemed to permit racial discrimination in public education. The Court fell into the same error into which Chief Justice Taney had fallen a century before. It overlooked or ignored the fact that its constitutional power is confined to the adjudication of *cases*.[28]

The judicial power of the federal courts does not extend to the giving of mere advisory opinions or determination of abstract propositions, but a justiciable controversy must exist.

Just three weeks before its 1955 opinion in the *School Segregation* cases, Justice Frankfurter speaking for a majority of the Court had said that the Supreme Court does not sit to satisfy a scholarly interest in intellectually interesting and solid problems, nor for the benefit of particular litigants.[29]

In the 1954 litigation between citizens of Kansas, Delaware, South Carolina and Virginia and the school authorities of those four states, the policy of the Government affecting forty-four other states could not be irrevocably fixed by the Supreme Court.

When and if a case arises in Georgia, or any other state of the Union in 1959 or a subsequent year involving alleged discrimination in public education, the parties to that case have a right to introduce evidence pertinent to the legal issues in that case and have those issues decided on the basis of the record in that case. The trial court may or may not feel bound to follow the 1954 *School Segregation* cases according to whether or not those cases lawfully control the issues then before the court.

That the statement last made is a correct statement of the "law of the land" may be easily proved.

In 1940, one Smith sued Texas election officials because they had denied him the privilege of voting in a primary. The trial judge, Judge Kennerly, thought that a decision of the Supreme Court of the United States rendered a few years before[30] was controlling and dismissed the petition. The case was appealed to the Court of Appeals for the Fifth Circuit. The appellate court (Judges Sibley, Hutcheson and Holmes) said that the Texas statutes regulating primaries which were considered by the Supreme Court in the prior case were still in force, and that that decision controlled. There was an application for certiorari made and granted. The Supreme Court overruled its prior decision of nine years before, and reversed the Texas federal judge and the Court of Appeals of the Fifth Circuit.[31]

The School Cases . . . Not the Law of the Land

Brown v. *Board of Education of Topeka, Kansas*, and its three companion cases are no more the law of the land today with respect to public schools than *Grovey* v. *Townsend* was the law of the land in 1944 with respect to primary elections.

The states of the South in regulating their own public schools in 1959 need be controlled and compelled by *Brown* v. *Board of Education of Topeka*, decided in 1954, no more than the colored voters of Texas were controlled and compelled in 1940 by *Grovey* v. *Townsend* decided five years before.

The colored voters of Texas thought the Supreme Court of the United States was wrong when in 1935 the Court said they could not vote in white Democratic primaries in Texas. They persisted in the efforts to vote. The Supreme Court reversed its prior decision and granted them the right they sought.

The states of the South think the Supreme Court of the United States was wrong when in 1954, the Court said they could not regulate their own public schools, when in 1954, the Court overturned century-old precedents. They are persisting in their efforts to regulate, and so save, their public school systems.

The states of the South defy no one.

The states of the South do insist that the school cases of 1954 are not the law of the land. The states of the South are seeking to have re-established as the law of the land the declarations of it which had existed a hundred years before May 17, 1954.

We do not "flout the decisions of the Supreme Court". Neither do we classify them as the "law of the land".

We simply say that the findings and beliefs of the Court expressed in the school cases do not irrevocably fix the policy of the Government upon vital questions affecting the whole people.

Was the decision of the Supreme Court of the United States in *Paul* v. *Virginia*[32] flouted when Attorney General Biddle persuaded Mr. Justice Black and several associates to decide *United States* v. *Southeastern Underwriters Association*?[33]

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26. 349 U.S. at page 298 (italics supplied).
27. 347 U.S. 483, 497.
28. Constitution, Article III, Section 2.
29. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74.
30. *Grovey* v. *Townsend*, 295 U.S. 45.
31. *Smith* v. *Allwright*, 321 U.S. 649.
32. 8 Wallace 168 (1868).
33. 322 U.S. 533.

Was the decision of the Supreme Court of the United States in *Hammer* v. *Dagenhart*[34] flouted when, twenty-two years later, the Court was induced through Attorney General Robert H. Jackson to overrule it?[35]

To cite any more of the myriads of such instances in the annals of American jurisprudence would be merely to labor to establish the obvious.

In a speech delivered in California during October, 1958, Dean Erwin Griswold apparently "tried to draw a line between firm but constructive comment on the one hand, and broadside attacks motivated primarily by dislike of results in particular cases".

While I heartily dislike the results of the *School Segregation* cases, I have endeavored to draw the line suggested by Dean Griswold.

Incidentally, the case[36] which Dean Griswold was criticizing is just as much the "law of the land" as is *Brown* v. *Topeka*. It will be interesting to see what happens to the "law of the land" as declared in that case.

I have sought to demonstrate, using specifics instead of generalities, that not only are the *School Segregation* cases not the law of the land, but that they are legally erroneous and that the errors with which they abound should have been detected and should now be corrected.

34. 247 U.S. 251.
35. *United States* v. *Darby*, 312 U.S. 100.
36. *Flora* v. *United States of America*, 78 S. Ct. 1079.

Searching the Federal Register

(*Continued from page 46*)

have already gone through two revisions each and forty-four revised volumes have been printed altogether.[50]

(4) In addition to all this official reprinting, unofficial reprinting is carried on by the agencies.

Reasons for Wasteful Unofficial Publishing. As long ago as 1942, attention was called to the unofficial publishing being carried on by the agencies:

> The act providing for the publication of regulations by a central office did not prohibit publication of these same regulations by the agencies themselves, and many of them have continued to do so, each in its own way.[51]

The agencies are still doing this. There are two reasons why they are forced into the wasteful practice of unofficial publication of the regulations—wasteful in terms of paper, typesetting, printing, proofreading and distribution: (a) the "forty-seven steps" severely limit the utility of the official publications; and (b) the various categories of regulations are not made separately available. These matters are discussed below.

Limited Utility of Official Publications. It is impossible to use the *Federal Register* and *Code of Federal Regulations* as normal legal materials. No one can afford to take the "forty-seven steps". Not only would it require an inordinate amount of time; there would be too great a possibility of oversight in the hurried examination of such a myriad of indices. Only by doing a daily "scissors and paste" job on the *Federal Register* is it possible to have a practical working set of official regulations. The agency publications, though unofficial, make it possible to avoid at least some of the scissors and paste.

The Matter of Separate Availability. In keeping with the concept that regulations are mere footnotes to the statutes, the *Code of Federal Regulations* commingles regulations of various categories in bound volumes. But, while few people concentrate on one title of the *statutes* to the exclusion of all the others, many people are concerned with only a single category of *regulations*. Agency personnel and members of the public as well are often interested in one category only and need to have it separately available.

Lack of Separate Availability of Titles. By regulation[52] and by statute,[53] it was provided that "as far as practicable, each title shall constitute a separate book", but it would appear that the word "practicable" has been given an interpretation which virtually nullifies the provision. Twenty-seven of these titles are not separately available;[54] seven of the titles would have been difficult to bind with others;[55] Title 34 has never been allocated; and nine of the separately bound titles are conglomerate in their nature.[56]

Lack of Separate Availability in the Case of Agencies. Agency personnel and members of the public often desire

50. This does not include the numerous revisions made of certain paper back volumes under Titles 26 and 32A.
51. Hicks. LEGAL RESEARCH 161 (3d ed. 1942).
52. 1 CFR 2.3.
53. 67 Stat. 388 (1953), as amended; 44 U.S.C.A. §311(b) (Supp. 1957).
54. The numbers of these twenty-seven titles, and their arrangement in eleven volumes, may be indicated as follows: 1-2-3; 4-5; 10-11-12-13; 22-23; 26-27-28-29; 30-31; 35-36-37; 40-41-42; 44-45; 47-48. Among the subjects bound together are the following: Mineral Resources (Title 30) with Money and Finance (Title 31); Prisons (41) with Public Contracts (42); Patents, Trademarks and Copyrights (37) with Panama Canal (35) and Parks, Forests and Memorials (36).
55. Titles 14, 32, 46, and 49 each require more than one volume, and the Department of Agriculture has Titles 6, 7, and 9 for its voluminous regulations, so it is not surprising that—in the case of these titles—there is no more than one to a volume.
56. Title 17 binds the regulations of the Securities and Exchange Commission with those of the Commodity Exchange Authority of the Department of Agriculture. Title 18 binds the regulations of the Tennessee Valley Authority with those of the Federal Power Commission. Titles 19 and 21 each have regulations issued by two agencies. Titles 33 and 50 each have regulations issued by three agencies. Title 20 has five categories of regulations issued by three agencies. Title 24 has four categories of regulations issued by two agencies. Title 25 has three categories of regulations issued by two agencies.

to have a convenient manual of an agency's regulations. In general, this is not possible with the officially published regulations. The regulations of a single agency tend to be scattered among various titles[57] and many of those titles embrace the regulations of more than one agency. For one whose interest is limited to a single agency, or segment of that agency, this is not convenient.[58] But even if one were willing to suffer the inconvenience, he is still met with the fact that many of these titles are not separately published. For the most part, under the official system, there is no separate availability of regulations: whether by category, by title, or by agency. Because of this, the agencies are driven into wasteful unofficial publishing in order to serve the needs of government personnel and the public.

The Proposed New System

In General. Under the proposed system, the *Code of Federal Regulations* and the *Federal Register* would be discontinued, but centralized publishing, through the Division of the Federal Register, would be retained. Each category of regulations (as well as the statutes pursuant to which they were issued) and notices related thereto, would be separately available for purchase. Each category of statutes and regulations, together with a subject matter index, would be published in the form of loose-leaf sheets. Thus, they could be kept up to date by means of replacement sheets; *i.e.*, a replacement sheet would supplant an old sheet whenever any part of the old sheet was modified by amendment or repeal. If an amendment called merely for supplementing rather than modifying existing regulations, it might be possible in some cases to add new sheets while leaving the old sheets undisturbed.

Numbering of Sheets. The sheets containing the regulations in force would be numbered[59] on one side only.[60] Each sheet number would be followed by a dash and the number of its edition; thus, "35—1" would indicate "sheet 35, first edition"; and, if an amendment required issuance of a second edition of sheet 35, it would be designated as "35—2": (a) If the amendment did not lengthen the text, only one replacement sheet would be required; (b) If the text were moderately lengthened, then—by using smaller type—one replacement sheet would still suffice; (c) If the length of the text were substantially increased, it would be necessary to add pages bearing decimal numbers; thus, two sheets inserted between 35—1 and 36—1 would be numbered "35.1—1" and "35.2—1."[61]

Check List. A Check List would be published at appropriate intervals, listing the numbers of the sheets then currently effective, thus:

101—1
102—2
103—1
105—2
106—3
106.1—2
106.2—1
107—1
108—2

Present Official Publication, Pursuant to Agency Document. The document by which an agency amends a body of regulations, in whole or in part (by modifying or supplementing the old text), may be considered to have two basic elements: (a) the amended text; (b) general recitals as to the nature of the agency action. Under the present system, the entire agency document [consisting of both (a) amended text and (b) general recitals] is published in the *Federal Register*. Thereafter, the amended text —even though it may be scores of pages in length—is reprinted in a cumulative supplement to the *Code of Federal Regulations*. Then it is again reprinted annually in cumulative supplements; and, in many cases, it is again reprinted from time to time in a

57. *E.g.*, State: Titles 22, 44; Treasury: Titles 12, 19, 21, 26, 27, 31, 33, 46; Army: Titles 32, 33, 36; Justice: Titles 8, 28, 40; Interior: Titles 25, 30, 32, 32A, 36, 43, 48, 50; Agriculture: Titles 6, 7, 9, 17, 36; Commerce: Titles 15, 23, 32A, 33, 37, 44, 46; Labor: Titles 20, 29, 40; Health, Education and Welfare: Titles 20, 21, 42, 45; General Services Administration: Titles 32, 32A, 44; Interstate Commerce Commission: Titles 32A, 49.

58. *E.g.*, persons whose interest is limited to cotton will have no use for regulations dealing with other subjects, but the officially published regulations affecting cotton can be had only by obtaining four bound volumes under Titles 6, 7, 17, and 26, each covering a broad range of subjects. For another example, see note 42, *supra*.

59. The sheet number might be followed by the date of publication expressed in a six digit number; thus, "580402" would indicate publication in the year 1958 on April 2. The effective dates of the respective regulations might also be indicated. Historical notes might be helpful.

60. By numbering only one side of the sheet instead of both sides, only half as many listings would be required on the Check List (see next paragraph in the text). Sheet numbers would be employed merely to make possible a Check List. They would not be needed as a guide to the text. It would be easy enough to locate material by section numbers.

61. If the original numbering were done by tens (*e.g.*, 110—1, 120—1, 130—1) instead of by units (*e.g.*, 101—1, 102—1, 103—1), decimal numbering would not become necessary unless lengthy amendments were made.

revised volume of the *Code of Federal Regulations*. No such reprinting would take place under the proposed system.

Proposed Official Publication, Pursuant to Agency Document. In the agency amendatory document, under the proposed system: (a) the amended text would be physically separated from (b) the general recitals. That is to say, the amended text would not be set forth along with the general recitals in the body of the document, but would be attached as an exhibit. There would, for example, be a recital to the effect that: "§220.1 is amended in the manner set forth in Exhibit '1' attached hereto, and a new §220.2 is added as set forth in Exhibit '2' attached hereto." (However, if repeal were involved, there would be no occasion for an exhibit: the fact of repeal would be included in the general recitals.) The amended text and the general recitals of the agency document would be published separately in the following manner:

(1) *Amended Text.* The amended text would not be published on a sheet by itself if the amendment in question changed only a portion of the regulations on an old sheet; in that case, the old sheet would be supplanted by a replacement sheet containing the amended text along with the portion of the regulations that remained unchanged.

(2) *General Recitals.* In making reference to the amended text, the general recitals in the agency document would refer to the "exhibit"; but, in the published version of the general recitals, the reference would be to the number of the "replacement sheet" carrying the amended text. (As indicated above, the "exhibit" attached to the agency document would be the basis for publishing a "replacement sheet", but the "exhibit" as such would not be printed.)

Locating Earlier Versions of a Regulation. Filed in a loose-leaf binder would be the superseded sections of the regulations (in numerical order), and the superseded Check Lists (in order of their date). Thus, for any given date, it would be simple to locate the then effective version of the sections of a regulation. After turning to the section numbers in question, one could—if necessary—be guided by the Check List applicable to the desired date. Such a search would be expedited if the date of adoption were set forth after each subdivision of the text. Many additional aids could be made available, but consideration of details of that nature is outside the scope of this article.

Frequency of Publication. Under the proposed loose-leaf system, a weekly mailing[62] of notices and regulations should be sufficient.[63] In comparing this with the present system, it must be remembered that by the time the subscriber receives an issue of the *Federal Register* the latest documents in it are almost a week old and some documents may be two weeks old because of agency tardiness in submitting them.

Citation of Regulations. The normal method of citing officially published decisions or regulations would be by reference to the issuing agency or its appropriate segment, or to the specific subject matter. This is done in the case of federal agency decisions;[64] there is no sound reason for doing otherwise. But this is not done at present in the case of regulations. They are blanketed under an omnibus designation (*Code of Federal Regulations*).

An agency does not necessarily issue all of its own reported decisions under a single designation, let alone commingle its reports with those of another agency under an omnibus designation. The citation of a report may designate a segment of an agency rather than the agency itself. A report of an administrative decision on immigration or naturalization, for example, is cited "3, I. & N. Dec. 141"; *i.e.*, the reference is to the Immigration and Naturalization Service of the Department of Justice rather than to the Department itself. A motor carrier decision of the Interstate Commerce Commission, for example, is cited "64 M.C.C. 803" (Motor Carrier Cases). The Commission has separate designations for two other types of reports, cited as follows: "96 I.C.C. 159" (railroad and other cases); "53 Val. Rep. 211" (Valuation Reports).

The present omnibus designation ("Code of Federal Regulations")—which is substituted for the names of the respective federal agencies in citing their regulations—has no more justifi-

62. ". . . [L]oose leaf . . . is not practical for a daily publication. A change to a weekly publication would enhance its value. . . ." Ronald, *supra*, note 30, at 86. For such categories of regulations as are infrequently amended, no fixed mailing schedule would be necessary; however, negative reports could be mailed at appropriate intervals.

63. If it should develop that there were a really strong demand for immediate service, this would not be difficult to supply. It could be required that regulations and notices, submitted for official publication, must carry a certification to the effect that copies thereof (prepared by any duplicating process) have been mailed directly by the agency to the subscribers. Subscription fees could be set at a level which would reimburse the agency for the expense.

64. Examples: 15 C.A.B. 397; 10 F.C.C. 454; 9 F.P.C. 32; 49 F.T.C. 220; 116 NLRB 842; 29 S.E.C. 52.

cation than there would be in substituting an omnibus designation (such as "federal agency reports") for the names of the agencies in citing their reported decisions.

Advantages of the Proposed System

It was probably anticipated that—subsequent to passage of the Federal Register Act—the Division of the Federal Register would in due course develop a plan for a basic change in the system of official publication in order to eliminate its obvious faults. But, as has been pointed out, publication has generally been behind schedule, through no fault of the Division. Under the circumstances, the Division had to give all of its attention to urgent publishing problems and could not be expected to develop a new system of publication:

> The editors of the Federal Register have labored well in the face of difficulties, and they merit praise for the many improvements made . . . They have encouraged reforms, and with surprising success they have held out against uncooperative agencies, parsimonious budget officials, and suspicious Congressmen.[65]

Be that as it may, a basic change in the system is long overdue. The *Federal Register* should be discontinued. Most of the material in that publication serves only to make it more difficult for the subscriber to locate the items in which he is actually interested. Even before the *Federal Register* was created, it was predicted that, if an official gazette were established:

> . . . The result would be that purchasers and libraries must fill their shelves with pages of material for which they have no use, and the task of searching for rules and regulations is made that much more difficult. Moreover . . . the material with which we are concerned does not lend itself to regularity in its natal days.[66]

The *Code of Federal Regulations* should also be discontinued. Under the proposed system, a page of the regulations in force would be reprinted only when a portion thereof needed to be changed. The costly burden of indexing and reprinting would be reduced to a minimum.

The method of publication proposed here would offer a sharp contrast to the present system which—subsequent to the issuance of the original bound volumes of the *Code of Federal Regulations*—has required preparation of hundreds of *Federal Register* indices every year and has been wasteful in terms of paper, typesetting, printing, proofreading and distribution in connection with the publishing of regulations in the *Federal Register*, then every year in the supplements to the *Code of Federal Regulations*, then in replacement volumes when the supplements get large, and finally in the unofficial publications of the agencies themselves. In sponsoring the Federal Register Act, Congressman Celler doubtless hoped that, as publishing experience was gained, improvements would be made to reduce printing costs. Not long after passage of the act, he said:

> By the coordination of printing activities of the various departments of the Government and the Federal Register, it may be possible to use the same type and it may be possible to cut down on the volume of publications issued by the various departments . . . It is believed that a considerable saving can be made by coordinating printing practices in this manner.[67]

Unfortunately, it has not worked out that way, and fundamental changes are required to correct the situation. As was said in a somewhat different context:

> . . . the adoption of a systematic scheme of publication would not mean more printing but simply the introduction of some semblance of order into the printing which is now done.[68]

It will be recalled that, under the present system, as many as forty-seven steps may be required to check on the current status of a regulation. In describing the situation that existed before passage of the Federal Register Act, Dean Griswold used language that is apposite even now:

> . . . The difficulty with the situation . . . [it] seems to me [is] that for some of the regulations it is not so hard to find them as it is awfully hard to be sure you have got the latest thing. The dangers are from the regulations you do not know about . . .[69]

The fact that the present system does not offer an adequate working tool has been pointed out by Professors Gellhorn and Byse:

> As now edited the Federal Register and Code of Federal Regulations are cumbersome and hardly adequate to meet the real needs of citizens and lawyers.[70]

By avoiding the transmittal of unwanted material to the subscriber, and by ending the need for a myriad of supplements[71] and indices,[72] the proposed system would eliminate the present waste and, presumably, should be less costly.[73] Yet it would make available a compact set of current regulations, something that is impossible with the present system. Each category of regulations would be separately available, and there would be an improved method of organization and citation.

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65. Newman, *supra*, note 11, at 946.
66. Griswold, *supra*, note 20, at 208-09.
67. 80 CONG. REC. 4271 (1936).
68. Griswold, *supra*, note 20, at 208.
69. *Hearings Before Subcommittee No. II of the House Committee on the Judiciary*, 74th Cong., 2d Sess., ser. 16, at 19 (1936). Quoted at 80 CONG. REC. 3885 (1936).
70. Gellhorn and Byse, ADMINISTRATIVE LAW 92 (1954).
71. ". . . The indices are of limited value; the supplements to the Code have been distributed tardily. . ." *Ibid.*
72. "It is not an easy index to use." Price and Bitner, EFFECTIVE LEGAL RESEARCH 137 (1953).
73. But even a higher cost would be justified. As the late Judge Harold M. Stephens said: "I do not care what the expense is, so that the public of this country and the lawyers shall be able to find the law accurately, dependably, and promptly, as far as the Federal Government is concerned." *Hearings, op. cit. supra*, note 69, at 15.

(*Continued from page 88*)

STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION. *By Joseph M. Snee, S.J., and A. Kenneth Pye. New York: Oceana Publications, Inc. 1957. $6.00. Pages 167.*

There was a time, not long since, when international law was a private preserve frequented by diplomats, law professors and a few practitioners with a specialty. This reviewer can remember taking a course in the subject while at law school—the total enrollment was two. Today the story is quite different. Emergence of the United States as a world power, the creation of the United Nations, the establishment of NATO and other regional pacts, the tremendous volume of international transactions, all have had their impact. We now have, beside international law in the traditional sense, a new kind of law, "transnational law", as it has been called by Professor Jessup, or to use another, less euphonious term, coined by Professor Julius Stone and adopted by the authors of the book under review, "conjurisdictional law".

What is this new law which has been thus conjured up by the course of events? It arises from the simple fact that the more or less permanent presence of the troops of one nation in the territory of an ally presents the question, "What country shall try them if they commit offenses?" At one time the answer of this country, with respect to our own troops stationed abroad, was: "We will."[1] But almost every other country has taken exactly the opposite position and has claimed jurisdiction over all offenses against its laws committed on its soil, no matter by whom. The NATO Status of Forces Agreement, and similar arrangements now in effect with several non-NATO nations, are attempts to resolve this impasse. Briefly, these agreements provide:

(a) the sending state shall have exclusive jurisdiction over all offenses solely against its laws;

(b) the receiving state shall have exclusive jurisdiction over all offenses solely against its laws;

(c) where the right to exercise jurisdiction is concurrent, (i) the sending state shall have the primary right to exercise jurisdiction over offenses solely against its property or security, or against the person or property of its troops and other personnel, and over offenses arising out of an act or omission done in performance of official duty, but (ii) in all other cases the receiving state shall have the primary right to exercise jurisdiction;

(d) the state having the primary right to exercise jurisdiction may waive that right to the other state; and

(e) any request for such waiver will receive sympathetic consideration where the requesting state considers a waiver to be of particular importance.

The present book is a compact but detailed treatment of the many problems of law, policy and administration which have arisen or which may arise under these agreements. The authors, both of whom are Professors of Law at Georgetown, recently completed a survey for the American Law Institute and the Defense Department of the actual operation of the NATO Status of Forces Agreement in France, Italy, Turkey and the United Kingdom. The book is based in part upon their findings but not exclusively so, since the authors have also made a detailed study of the working papers containing the negotiating history of the agreement, and have included a consideration of the many judicial decisions and administrative rulings which have been promulgated.

As the book observes, a whole new body of jurisprudence is growing up under the NATO Status of Forces Agreement and similar treaties. Already one *cause célèbre* (the *Girard* case) has been decided by the Supreme Court of the United States. Another (the *Whitley* case) is now pending before the *cour de cassation* of France.[2] A large number of law review articles have been written exploring specific topics, but this is the first full-length book on the subject.

The authors' method is to take each provision of the agreement and subject it to line-by-line analysis, supplementing this with a thorough discussion of actual cases and problems which have arisen under the more important provisions. While this does not make for easy reading, the result is a comprehensive, scholarly and convincing presentation of a new and important area of the law, known to most lawyers only through headlines of dramatic news stories or, possibly, from a few court decisions disposing of constitutional issues. Among the problems treated are:

Jurisdiction over Dependents—The somewhat surprising conclusion is reached that in the case of dependents (as opposed to troops and civilian employees) the receiving state has the exclusive, and not merely the primary right to exercise jurisdiction (unless the offense is solely against the laws of the sending state). The wording of the agreement and the history of negotiations show that this was actually intended. Even if this were not the case, trial by a United States court martial of dependents who are American citizens, at least for capital offenses, has been precluded by the decisions of the Supreme Court in the *Covert* and *Krueger* cases, 354 U.S. 1 (1957), and the agreement does not contemplate the exercise of *civil* jurisdiction by a sending state.

Waiver of Primary Jurisdiction: In the *Girard* case, 354 U.S. 524 (1957), the Supreme Court held that the United States could, without violating the constitutional rights of the accused, waive its primary right to exercise jurisdiction. (It was assumed for purposes of the case that Girard's offense arose out of an act or omission done in the performance of official duty, something by no means clear from the facts.) The *Girard* case involved a waiver by the United States to the receiving state. In the vast majority of cases, the waiver has run the other way. The United States has requested and obtained innumerable waivers in cases where the receiving state had the primary right to exercise jurisdiction.

Effect of Non-Exercise of Jurisdic-

1. This was at least the general military view, although it was not unanimously accepted. In *Wilson* v. *Girard*, 354 U.S. 524 (1957), the Supreme Court espoused the contrary view, citing *Schooner Exchange* v. *M'Faddon*, 2 U.S. 478, 481 (7 Cranch 116, 136) (1812). This was, of course, after the ratification of the NATO Status of Forces Agreement and the execution of the administrative agreement between the United States and Japan covering the same subject.
2. See note 3, *infra*.

tion: Suppose that the receiving state, having the primary right to exercise jurisdiction, waives such right to the sending state. The latter after investigation decides not to try the accused. May the receiving state reassert its primary right? This was the *Whitley* case (*Aitchison* v. *Whitley*, 43 *Revue critique de droit international privé* 62 (1954)). The *cour d'appel* held that the accused, not having been tried by the American authorities, could still be tried by the French. This case has provoked a great deal of learned discussion, both here and abroad, and is now before the *cour de cassation*. The authors, after reviewing the arguments pro and con, conclude that, while a mere failure by the sending state to take any action at all should not bar a subsequent trial by the receiving state, a considered decision not to prosecute, made after careful investigation and legal analysis, as happened in the *Whitley* case, should bar a later trial by the receiving state. In practice, the problem is complicated by the fact that in France, and elsewhere, a private party may demand that criminal proceedings be instituted and apparently must do so if he is to collect damages. In the *Whitley* case the proceedings in the French courts, which resulted in a conviction of culpable homicide through negligent driving, were instigated by the widow of the deceased, a Canadian officer, after Whitley's insurance company, presumably American, had refused to pay compensation without a determination of legal liability. A graphic illustration of "transnational" law in action!

Constitutional Rights of the Accused: In consenting to ratification of the NATO Status of Forces Agreement, the United States Senate adopted a resolution which, in effect, requires the military to examine the laws of each foreign state asserting jurisdiction under the agreement "with particular reference to the procedural safeguards contained in the Constitution" and, wherever it would appear that the accused might be denied the rights he would enjoy under our Constitution, to take appropriate action through military and diplomatic channels to obtain a waiver of jurisdiction. The authors explore the meaning and effect of this resolution. While their treatment in the text itself is very brief, it is supplemented by appendices on the burden of proof and presumption of innocence, on the right against self-incrimination, and on trials *in absentia*. The first of these studies effectively dispels the myth that in a civil law jurisdiction the accused has the burden of establishing his innocence. The second shows that, at least in France, Italy and Turkey, the accused enjoys substantially the same privilege against self-incrimination as he would in the United States; in the United Kingdom, of course, his rights are virtually identical. As to trials *in absentia*, the third appendix concludes that, while theoretically they may be held in certain countries, the problem is not a serious one as a practical matter.

Other appendices give the full text of Article VII of the NATO Status of Forces Agreement (the remaining Articles deal with other topics), and the opinions of the District Court and the Supreme Court in the *Girard* case.

The authors' conclusions are:

(a) The challenges presented by this new field of law are being ably met by our military legal officers, with the full co-operation of foreign officials;

(b) The technical legal problems which admittedly exist do not justify the violent and undiscriminating attacks which have been made on these agreements;

(c) Trials of American military personnel in the four countries visited are conducted fairly and impartially, and no cases were found in which fundamental rights were violated, or procedures followed or results reached which would shock the conscience or offend against a concept of ordered liberty.

These are heartening findings.

This reviewer has a few minor complaints about the book, principally as to format. The print is small and the binding not very sturdy. There is no index and no table of cases. These cavillings aside, the authors are to be congratulated for an able, scholarly and authoritative study of a new and important area. Their book is an inspiring testimonial of their own competence and skill, of the devotion and zeal of our military and diplomatic officials, and of the good faith and whole-hearted co-operation of our allies.

ROBERT S. PASLEY

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3. Since this writing, it has been learned that the *cour de cassation* has reversed the *cour d'appel*, taking substantially the same position as that of the authors of the book under review. (Decision of March 25, 1958).

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Annual Meetings

Greater Miami Beach Area, Florida	August 24-28, 1959
Washington, D. C.	August 29-September 2, 1960

Board of Governors Meeting

Spring Meeting, Washington, D. C.	May 17-19, 1959

Midyear Meeting, House of Delegates

Edgewater Beach Hotel, Chicago, Illinois	February 19-24, 1959
Board of Governors	February 20-21, 1959
Group Meetings	February 21-22, 1959
House of Delegates	February 23-24, 1959

Regional Meetings

Pittsburgh, Pennsylvania	March 11-13, 1959
Memphis, Tennessee	(Tentative Dates) November 12-14, 1959
Houston, Texas	November 9-12, 1960